Supreme Court, U.S.
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No. 99 331

In the Supreme Court of the United States
October Term, 1998

Michael Dennis Early, et al.,
Petitioners,

v.

The Toledo Blade,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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I

QUESTIONS PRESENTED

1. Are radio and television commercials advertising a pending series of newspaper articles on the police department which commercials assert that the "facts" are "absolutely" "right," the story is "absolutely" "fair", and "we can assure you that its more than fair, it's the truth," evidence the courts may consider in determining whether the reckless disregard element of *New York Times v. Sullivan* standard has been met?

2. Do victims of long past domestic violence that never resulted in a public criminal charges or trial have a privacy interest in not being specifically identified in newspaper articles published many years later; should lack of newsworthiness from passage of time be an recognized exception to a First Amendment privilege to publish any public record no matter how old or even if the record was private when initially created?

PARTIES TO THE PROCEEDINGS AND DESIGNATION OR CORPORATE RELATIONSHIP

Michael Dennis Early- Individual
and Toledo Police Officer
Mary Ann Hodak (Rose)- Individual
and Toledo Police Officer
John P. Smith- Individual
and Toledo Police Officer
George Taylor- Individual
and Toledo Police Officer
Robert Case- Individual
and Toledo Police Officer
Martin Schabor- Individual
and Toledo Police Officer
Robert Barboza- Individual
and Toledo Police Officer
Kimberly Kristoff- Individual
and Toledo Police Officer

Jane Lewis- Individual
and wife of a deceased Toledo police officer
Linda Leichty- Individual
and wife of a deceased Toledo police officer

The Toledo Blade- an Ohio Corporation
and wholly owned subsidiary of Blade Communications, Inc.

Blade Communications, Inc.- an Ohio Corporation

TABLE OF CONTENTS

QUESTIONS PRESENTED.....I

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONSHIP.....II

TABLE OF AUTHORITIES.....VI

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....2

STATEMENT OF CONSTITUTIONAL PROVISIONS AT ISSUE.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT OF CERTIORARI.....9

A. Differences in presentation of a published defamation are relevant to the question of whether the publisher acted in reckless disregard of the truth per Justice Blackman's concurrence in Harte-Hanks Inc. v. Connaughtn, 491 U.S. 157, (1989). It is one thing to present a statement as an allegation, it is another thing to present a statement as true, and it is yet another thing for a publisher to assure that a statement is absolutely true.

B. The Constitutional privilege recognized in *Florida Star v. B.J.F.* 491 U.S. 524 (1989), does not apply to protect the publishing of old public records that are no longer newsworthy and in which privacy interest is recognized, *Dept. of Air Force v. Rose*, 425 U.S. 353, (1976) and *Dept. of Justice v. Reporters Committee*, 103 L. Ed. 2d 774, (1989).

CONCLUSION.....14

APPENDIX.....A1

"Opinion and Judgment Entry" of the Court of Common Pleas of Lucas County, Ohio in *Early v. The Toledo Blade* No. CI-90-3434 dated July 8, 1998.....A1

"Opinion and Judgment Entry" of the Court of Appeals of Lucas County, Ohio in *Early v. The Toledo Blade* No. L-97-1286 dated October 9, 1998.....A144

"Entry" of the Supreme Court of Ohio in *Michael Dennis Early, et al., v. The Toledo Blade, et al.,* case no. 98-2490 dated March 3, 1999.....A157

TABLE OF AUTHORITIES

Cases:

Curtis Pub. Co. v. Betts, 388 U.S. 130 (1967)
Dept. of Air Force v. Rose, 425 U.S. 353 (1976)
Dept of Justice v. Reporters Committee, 103 L. Ed. 2d 774
Florida Star v. B.F. J., 491 U.S. 657 (1989)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)

Constitution:

The First Amendment to the Constitution of the United States.

In The Supreme Court of the United States

October Term, 1998

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The "Opinion and Judgment entry" of the Court of Common Pleas of Lucas County, Ohio, granting defendants summary judgment motion in the case of *Michael Dennis Early et al. v. The Toledo Blade Company et al.* was issued July 8, 1997, consisted of 163 pages and was reformatted and reprinted in the appendix at A-1. The trial court granted the defendants' motion for summary judgment as to the defamation plaintiffs' claims based upon its analysis of *New York Times v. Sullivan* US 1964. The trial court granted defendants motion for summary judgement as to the invasion of privacy plaintiffs based upon to its analysis of *Florida Star v. B.J.F.*, 491 US. 524 (1989).

The "Opinion and Judgment entry" of the Court of Common Pleas of Lucas County, Ohio, in case no. L-97-1286 affirming the decision of the trial court journalized

on October 9, 1998 and was reformatted and is printed in the Appendix A.

The "Entry" of the Supreme Court of Ohio in *Early v. the Toledo Blade*. Case no. 98-2490 declining jurisdiction to hear this case was issued March 3, 1999 and is reprinted in the Appendix at A.

STATEMENT OF JURISDICTION

The judgment entry of the Ohio Supreme Court Declining Jurisdiction was issued March 3, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. $1257 and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF CONSTITUTIONAL PROVISIONS AT ISSUE

The petition of writ of certiorari involves the First Amendment to the Constitution of the United States. It provides,

> "Congress should provide no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the press, or of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

By June 21, 1990, the Toledo Blade had begun running TV and radio commercials advertising the upcoming Toledo police misconduct series. The commercial, Ex. B. pp. 006746,

> Editor: It's inconceivable that this kind of Toledo police misconduct has been hidden from view for 17 years! Are you ***absolutely sure*** your facts are ***right***?
>
> Reporter 1: Yes! We spent seven months – ***seven whole months*** – digging in 200,000 government records; Police reports; court records; Internal Affairs reports; investigative reports; personnel files. Hey – we couldn't have been more thorough!
>
> Editor: OK! OK! Is your story ***fair***?
>
> Reporter 2: ***Absolutely!*** Look, we talked to dozens of officers and citizens. We got enough for an 8-part series and we can ***assure*** you, it's ***more*** than fair. ***It's the truth***!

The Toledo Blade informed the readers that 1) the Series was ***absolutely sure of its facts,*** 2) the Series was ***absolutely*** fair, and 3) it could ***assure*** that the Series was ***the truth.***

The facts regarding the seven defamed police officers were not true, not fair, and were not accurate, as the evidence subsequently has shown. Moreover, the Blade knew that they were not, as the evidence also shows.

On June 24, 1990 at the start of the series the Blade published an article headlined, "Secret Files" became a 7-month exploration of police misconduct. The article related the sources reviewed and described the Series. The Blade reported, Roe adds:

> "We *pared it down to* cases that seemed to affect the community –*alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases."* Once they had done this, the pair set out to recreate *key* incidents, *talking with* persons associated with *those cases, the officers*, their commanders, victims, and bystanders. (Emphasis Added).

The Blade on June 24, 1990 on it's front page, headlined "Secret Police files reveal crimes, cover up". On page D4 of the special insert under the headlines of "Two decades of Crime and Cover up" and "Citizens Pay the Price of Police Wrongdoings," the blade discussed the incident involving Officer Schabor and Dane Glassford. The next day, June 25, 1990, under the "Police violence: a costly, recurring problem for city" headline it again discussed the Schabor/Glassford incident and another incident involving Officer Schabor and Michael Morin.

Then on page 6 under the subheading "Two incidents in six months the incidents are again recounted." On page 7 is another article on Officer Schabor headlined

> "Despite IA record, a good street cop". On page 6 the incident involving Officer J.P. Smith is discussed. At the bottom of page 7, June 25, 1990 is a subheading of "Other key cases" and articles on Robert Case and Officer George Taylor.[1]

On June 27, 1990, page 4, under "Private Strife, public concerns" the incidents involving the invasion of privacy plaintiffs Kim (Little) Kristoff and Linda (Lewis) Leichty, and Jane Lewis, were published. Another article on Officer (Little) Kristoff appears on page 1 on June 28, 1990.

Harte-Hanks Inc. v. Connaughtn, 491 U.S. 157, (1989). It is one thing to present a statement as an allegation, it is another thing to present a statement as true, and it is yet another thing for a publisher to assure that a statement is absolutely true.

On June 28, 1990 on page 1 under a photo [2] and a headline "Errors of Judgment that end in tragedy" and

---

1 Note that in these cases, the Blade in June 24, 1990 overview article stated that it was talking with the officers, "victims" and bystanders. The Blade admits not talking to Officers Case and Taylor, nor with witnesses who saw the incident.

2 The photo was falsely stated to be the scene seen by Officer Hodak (Rose) per the phrase "still on the living room floor" in paragraph 9 of the article.

key finding that ",...citizens have died...for neglect of duty continuing on page 6 the incident involving Mary Ann Hodak (Rose) was published. The key findings relate to officer Hodak (Rose) since only two stories in the series discussed death of a citizen. One June 28, page 1 and page 6 under the headline "Armed and Dangerous" and "Guns, Alcohol: A Deadly Mix" the incident involving Officer Early was published.

On June 30, 1990, under page 1 under the headline "Drink, Drugs: a Problem in the Blue" is a photo and discussion of the incident of Officer Barboza, continuing on page 6. Another article on Officer Barboza appears on July 1, 1990, page 1 and page 6, under "Troubles Backgrounds Don't Always Disqualify Candidates." The evidence the affidavit of each plaintiff, deposition of reporters, deposition of experts, and documents in possession of the Blade for each plaintiff was put under a tab naming the particular plaintiff. Defamation plaintiffs, Early, Taylor, Case, Smith, and Barboza and privacy plaintiff Kristoff filed their complaint on October 11, 1990. After discovery of the republication of the articles and as further evidence of malice. The Blade reporters admitted to reading and reviewing the complaint prior to republishing the reprint. Additional defamation plaintiffs, officers Schaber and Hodak (Rose), joined the amended complaint along with the privacy plaintiffs Leichty and Lewis. The complaint was subsequently amended with the consent of defendant to add Blade Communications, Inc. as the alter ego and parent company of the Toledo Blade, Inc.

The case was bifurcated into liability and damages so that discovery would only proceed only liability issues.

The defendant filed its motion and memorandum for summary judgment in November 1992 with supporting exhibits, plaintiffs filed their memorandum contra with appendices of each plaintiffs' case with all evidence in support, a compilation of the cases cited with a summary of the holdings of each case in December 1992. Separate packages were provided for defamation plaintiffs and privacy plaintiffs. Plaintiff's filed the depositions, reports and affidavits of their experts Professors Saha and Jamison. Defendant moved to strike the opinions of plaintiff's experts. On February 23, 1993 the post the parties filed argument memoranda. Over the next four years a request for ruling and additional authorities were submitted, on July 8, 1997 the trial court granted summary judgment to defendants on all of plaintiff's claims. The trial court did not accept plaintiffs argument that the pre-publication advertisements of *absolute truth* and *fairness* were relevant to the issue of whether the publisher acted with reckless disregard. The trial court did not accept plaintiffs assertion that the domestic violence victims had a privacy interest in not being identified from long ago unofficial proceedings which were no longer newsworthy.

The Court of Appeals consolidated the cases and in an opinion and judgment entry judgment on October 9, 1998. The Ohio Supreme Court declined review on March 3, 1999.

Appellants will reference the specific facts of only one or two appellants per argument, however argument is generally applicable to all privacy affidavits and all defamation appellants.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Supreme Court should grant this petition for a writ of certiorari for two good reasons: differences in presentation are clearly relevant to whether a publisher has acted with reckless disregard for the truth, and the facts of the case give this Court an opportunity to clearly say so; second this court's opinion in *Dept. of Air Force v. Rose* , 425 U.S. 353 (1976) appears to be at variance with *Florida Star v. B.J.F.* 491 U.S. 524 (1989) unless the passage of time does make formerly pubic records less newsworthy resulting in a termination of a press privilege to violate a domestic violence victim's privacy interest.

A. Differences in presentation of a published defamation are relevant to the question of whether the publisher acted in reckless disregard of the truth per Justice Blackman's concurrence in *Harte-Hanks Inc. v. Connaughtn*, 491 U.S. 657, (1989). It is one thing to present a statement as an allegation, it is another thing to present a statement as true, and it is yet another thing for a publisher to assure that a statement is absolutely true.

Appellants would like this Court to clearly endorse

concurrence in *Harte-Hanks Inc. v. Connaughtn*, 491 U.S. 657, (1989). It is one thing to present a statement as an allegation, it is another thing to present a statement as true, and it is yet another thing for a publisher to assure that a statement is absolutely true. Justice Blackman's comments in his concurrence Harte-Hanks Inc. v. Connaughton, 491 U.S. 657 (1989) referring to *Curtis Pub. Co. v. Betts*, 388 U.S. 130, (1967), where the informant's description of the events was presented as truth rather than contested allegations,

> *There differences in presentation are relevant to the question whether the publisher acted in reckless disregard of the truth, presenting the content of Thompson's allegations as though they were established fact would have shown markedly less regard of their possible falsity.* (Emphasis added.)

Officer George Taylor was surprised one morning in June of 1990 to read in the morning newspaper under the series on police misconduct Day Two:

"Police Violence: A Costly recurring problem city", and

"Brutality, you decide", and subheaded "Other key cases," to see his photo in a story asserting that he had broken a Mr. Reasonover's arm during an arrest. This series had been previously advertised on TV and radio as

"Absolutely true", and "Fair". A previous article stated

that the reporters had talked with the officers and the victims in "key" cases.

> The story in the Blade related,
>
> A steamed officer Taylor, Jr. kicked in the back door, cutting his leg, and
>
> Grabbed Mr. Reasonover in the kitchen.
>
> The officer twisted Mr. Reasonover's arm behind his back, slipping his nightstick between the man's arm and back.
>
> Using his arm as a lever he pushed and pushed. Then *snap*. Mr. Reasonover's arm broke.

When the reporters were examined in deposition, reporter Murray stated he wrote the story using the word "stormed" asserting that Officer Taylor stormed into the backdoor. Reporter Roe juiced up the story by changing the word stormed to "steamed." Mr. Roe had no source for any description of the mental state of Officer Taylor, he merely fabricated it. Plaintiff, appellant asserts that the fabricated mental state makes it more likely for the reader to believe the injury was an act of brutality rather than an accident occurring during an arrest.

In any event Officer Taylor *was not the person who arrested Mr. Reasonover*. It was his partner, Sherry Guilford who made the arrest and broke the arm. Officer Guilford had so testified during the criminal proceedings

involving Mr. Reasonover over ten years prior to this article being published.

Since Mr. Reasonover had died prior to 1990 the only source that reporter Roe and Murray had for identifying Officer Taylor was a son who was not present at the arrest and who had no firsthand knowledge as to what had happened. Even though this was a "key" case and the Blade said it spoke to officers in "key" cases, the reporters had not contacted Officer Taylor. The reporter had Officer Taylor's personnel file with his home phone number on it and available to them over the months they were preparing this series and this story.

It might have been one thing for the Blade to report that the *son* of a man injured pursuant to *alleged* police brutality *alleges* that officer Taylor was the officer who broke his fathers arm. It is another thing to report that office Taylor broke Mr. Reasonover's arm. It is even quite another thing to say that it is absolutely true that a *steamed* officer Taylor slipped *his nightstick* between the man's arm and back. *Using it as a lever, he pushed and pushed.* Then *snap.* It is incredible that these details were to known to a hearsay source who wasn't present to give these graphic details. This is a gross fabrication of an event that never occurred, created by the reporters knowing there was no source for such detail. A jury could certainly find a reckless disregard and summary judgment was inappropriate.

The Toledo Blade was reckless in presenting this story as having an accuracy and truthfulness that it

could not possibly say it had with no firsthand source. The purpose of a free press is to provide victory of truth over falsehood. An absolute privilege to publish falsehoods would promote the victory of falsehood over truth.

B. The Constitutional privilege recognized in *Florida Star v. B.J.F.* 491 U.S. 524 (1989), does not apply to protect the publishing of old public records that are no longer newsworthy and in which a privacy interest is recognized. *Dept. of Air Force v. Rose*, 425 U.S. 353, (1976) and *Dept. of Justice v. Reporters Committee* , 103 L. Ed. 2d 774, (1989).

The Ohio Court of Appeals erred in applying the *Florida Star v. B.J.F.*, 491 U.S. 524, (1989) case to plaintiffs-appellants. The *Florida Star* case dealt with *recent newsworthy* events and gave a blanket constitutional privilege for the disclosure of victims names involved in such events. However, this court in a case virtually identical to this one has held that Air Force Officers have a privacy interest against disclosure of *old disciplinary records* occurring when they were cadets at the Air Force Academy. The old disciplinary records were not newsworthy even though the topic of discipline at the Academy might be. *Dept. of Air Force v. Rose* (1976), 425 U.S. 353, 48 L. Ed.2d 11, 96 S. Ct. 1592, see also *Dept. of Justice v. Reporters Committee* (1989), 103 L. Ed. 2d 774 at 792 citing to *Dept. of Air Force v. Rose*.

The distinction between present newsworthy records and old once public records was explained in *Diaz*

v. Oakland Tribune, Inc. (Cal, App, 1983), 188 Cal. Rpt. 762 at 771,

> Moreover, matter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy.

The Ohio court erred in failing to apply this distinction and in not following *Dept. of Air Force v. Rose* in applying its constitutional provisions.

Plaintiffs can only state that if the Air Force Officers have a privacy interest against disclosure of old disciplinary records then certainly the victims of police officers domestic abuse have a privacy interest from disclosure from old internal affairs files identifying them as such victims. The abuse that a former and deceased police officer Lewis committed against his ex wife, Linda, and widow, Jane, 10 years and 15 years prior to publication was not newsworthy. There is no rational basis for giving First Amendment protection to publishers of old newsworthy matter that invade a person's recognized privacy interest. The court should grant review.

CONCLUSION

The series of articles published by the Toledo Blade simulated investigative reporting. However the series was merely a cumulative result of digging through twenty years worth of old complaints and allegations in internal affairs files that were for the most part so unsubstantiated they never resulted in any public charge or proceedings. The passage of time didn't make any of the allegations any more substantial or newsworthy than they were originally. The Toledo Blade should have known that making the assertion that making these old allegations were absolutely true, without corroborative investigative reporting was reckless.

If a reporter has a hearsay source for a defamatory allegation it is not reckless to report the allegation as an allegation. It would seem to be more likely to be reckless for a reporter to publish an allegation from a hearsay source as a true fact. It would appear evident that publishing an allegation from a hearsay source as a true fact with assurances to the reader that the fact is absolutely true and adding embellishments and detail to the story that only a person with firsthand knowledge could relate, is reckless disregard for the truth. The difference in presentation is evidence for the courts to consider when applying the Constitutional privilege applicable to public figures.

Victims of rape and domestic violence are almost always women. The publication of these victims names and addresses causes them to be victimized again by the

invasion of privacy. There may be some overwhelming Constitutional First Amendment interest in allowing the press to reassault these crime victims because of newsworthiness and a public interest in the crime. However whatever newsworthiness there was at the commission of the crime certainly has dissipated after a few months and is gone after a few years. There remains no societal or First Amendment interest in allowing these crime victims to be re-victimized years later and after having put the matter behind them. This court should take this opportunity to let women victims of crime know that they can regain their privacy over time and that they do not have to fear repeated re-exposure in the press.

For these reasons petitioners respectfully request that this court grant a writ of certiorari to the Supreme Court of Ohio.

Respectfully Submitted,
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APPENDIX

BEST AVAILABLE COPY

Case No. 90-3434

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

MICHAEL DENNIS EARLY, et al., Plaintiffs, et al.,
v.

THE TOLEDO BLADE, Defendant.

OPINION AND JUDGMENT ENTRY

This is a final appealable order

Filed Lucas County July 8, 10:21 a.m. 1997
Common Pleas Court; Harry Barlos, Clerk of Courts

This cause is before the Court on the notion for summary judgment filed by The Toledo Blade ("The Blade"). Upon consideration of the evidence, pleadings, memoranda of counsel, and applicable law, the Court grants The Blade's motion.

I.

From Sunday-through-Sunday, June 24 through July 1, 1990-The Toledo Blade ran an investigative series entitled "The Secret Files of Internal Affairs." That series examined misdeeds within the Toledo Police Department over the seventeen-year history of the Internal Affairs Unit.

The series was intensely promoted before and during its run, with television, radio and print advertisements. These ads suggested epic misconduct, and charged massive cover-up by police officials. The series was documented in large measure by culling previously confidential records compiled by the Internal Affairs Unit. The Blade gained access to these records as a result of a decision of the Ohio Supreme Court in a case in which The Blade was a participant [*State ex re. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79], as well as its dogged persistence in forcing disclosure of the IA records based upon the new decision.

The series began with an introductory piece on Sunday, June 24, 1990, which featured a number of instances of police misconduct and/or bizarre behavior. Day One also featured an "Op-ed" piece by then Blade National News Editor John Nichols, which described the processes used by Blade reporters, Sam Roe and David Murray, in compiling the series (the "Nichols Piece"). The series then continued by category: Day Two dealt with police violence; Day Three reviewed examples of sexual misconduct by Toledo police officers; Day Four recounted instances of domestic violence and other relationship-related behavior in which police officers were involved as perpetrators; Day Five discussed police errors in judgment that ended in citizen injury or death, as well as general police misconduct; Day Six dealt with weapons misconduct and/or negligence; Day Seven featured police drug and alcohol abuse; and Day Eight ran, summing-up pieces

on recruit screening techniques, and on alternative methods of handling citizen complaints, concluding with a front-page editorial on Sunday, July 1, 1990 which, among other things, demanded the creation of a Citizen Review Board. The Blade printed subsequent editorial comment as to some of the matters raised over the course of the series (i.e., beyond July 1, 1990), and eventually ran a separate reprint of the entire series for the purpose of submitting the effort in competitions for journalistic prizes.

As will be seen repeatedly below, much is made by the plaintiffs in this case as to the Nichols piece that ran the first day. The plaintiffs have and still do maintain that some of the claims and assertions contained in the Nichols piece raise the stakes for the defendant newspaper by changing the constitutionally mandated standards by which a publication is judged in public official defamation cases. This claim, pressed by most of the plaintiffs herein, is wholly without merit as will be seen in the pages that follow. Nevertheless, it is fair to characterize the Nichols piece as sophomorically pedantic ("Good journalism is almost always troubling...") and cloyingly self-congratulatory ("In almost every sense this series represents the most challenging journalism The Blade has ever produced."). In fact, Nichols described the reporters' efforts in almost herculean terms. Moreover, the Nichols piece, in describing the efforts of the reporters, made several claims that were not borne out by matters ultimately reported. Nichols stated, "...the pair set out to recreate key incidents, talking with persons associated with

those cases: the officers, their commanders, victims and bystanders...," though it becomes clear that neither Roe nor Murray ever spoke to plaintiff-Officer George Taylor or plaintiff-sergeant Robert Case (or their commanders) to get their versions of the respective Reasonover and Eichenlaub incidents included on Day Two of the series.

The Nichols piece also quotes reporter Murray as saying, "We recognize that cops screw up, but we also know that they do a lot of good things. So we went through all the police personnel files looking for examples of extraordinary performance." Save for a Day Two reference to citations and a medal awarded to plaintiff-officer Martin Schaber, there are no other mentions of extraordinary performance. A number of officers mentioned (including at least plaintiffs Case, Taylor, Smith and Barboza) had files which contained similar distinctions.

Regardless, this series-which ran for over 1,700 paragraphs-refers to some 133 current and former T.P.D. officers by name, and several others are referred to generally. Only ten of these officers became plaintiffs in this lawsuit, along with two civilians who were former wives of deceased officer Donald Lewis.[1]

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1 An eleventh police officer (Fred E. Powell) filed a separate action in this court, styled *Powell v. The Toledo Blade Co.* CV91-1550. The newspaper had printed the plaintiff's picture as Officer Fred A. Powell, an individual who had been treated for alcohol abuse. A Blade reporter had provided the

This lawsuit generated approximately 2,500 pages of depositions, and the summary judgment motion itself (and a previous motion to dismiss) led to the filing of numerous exhibits, which occupy a number of cardboard boxes to this day. Hundreds and hundreds of cases were cited by the two sides through a series of briefs and memoranda that were filed, bearing on the various motions filed in this case. All of those deposition pages, each of those exhibits, and every single one of the cases cited have been read, reviewed and then re-read and re-reviewed. Needless to say, this has been a long and arduous process, made more difficult by the conduct of plaintiffs' counsel, which shall be discussed in greater detail in the postscript of this opinion.

The lawsuit ultimately came down to thirty-seven specific claims asserted by a dozen plaintiffs. As an aid to the reader in following this opinion through its many pages, the Court has devised a chart which sets forth the various claims asserted, broken down, plaintiff by plaintiff:

TABLE OMITTED

II.

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police department with the correct middle initial, but a police sergeant, in records, inadvertently placed Fred E. Powell's photo in an envelope marked Fred A. Powell. The Blade was dismissed as a defendant, and the Court granted summary judgment to the defendant City of Toledo on immunity grounds. The Sixth District Court of Appeals affirmed in *Powell v. The Toledo Blade Co.* (Feb. 25, 1994), Lucas App. No. L-93-281, unreported.

A summary judgment motion filed pursuant to Civ. R. 56 (C) will be granted under limited circumstances: (1) where there is no genuine issue of material fact, (2) where the moving party is entitled to judgment as a matter of law, and (3) where, after construing the evidence in a light most favorable to the non-moving party, reasonable minds can only reach a conclusion adverse to that party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Only when the movant makes this tripartite showing is summary judgment appropriate. *Id.*

Where, as in the instant case, the non-movant bears the burden of producing evidence on an issue at trial, the non-movant may not rely on the allegations of its pleadings in response to a summary judgment motion but must affirmatively demonstrate the existence of some triable issue of fact. *Wing v. Anchor Media. Ltd. of Texas* (1991), 59 Ohio St.3d 108, syllabus paragraph three; Civ. R. 56 (E) . "To meet this burden, the non-moving party must produce more than a scintilla of evidence to support his claim since he must be able to demonstrate that he is entitled to judgment in his favor." (Citations omitted.) *Nelson v. Taoka* (1992), 82 Ohio App.3d 101, 108. Moreover, "the non-moving party may not rely on isolated facts to support his claim. Rather, he must show that the evidence as a whole substantiates his claim." *Paul -Uniroyal Plastics Co.* (1988), 62 Ohio App. 3d 277, 282, citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.* (1986), 475 U.S. 574, 587.

Freedom of the press is one of the most sacred rights guaranteed in our country. The First Amendment of the United States Constitution plainly states that "Congress shall make no law * * *abridging the freedom of speech, or of the press * * *." The United States Supreme Court has also declared that "[w]hatever differences may exist about the interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama* (1966), 384 U.S. 214, 218; *Landmark Communications. Inc. v. Virginia* (1978), 435 U.S. 829, 838. The First Amendment freedoms of speech and of the press must, however, be balanced against another right - an individual's right of privacy. As the Ohio Supreme Court explained:

> "The right of privacy is the right of a person to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." *Housh v. Peth* (1956), 165 Ohio St. 35, paragraph one of the syllabus.

Ideally, the press's role in this scheme is to "guard against the miscarriage of justice by subjecting the police prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* In carrying out this role "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the constitution and like many other virtues it cannot be legislated." *Miami Herald Publishing Co. v. Tornillo*

(1974), 418 U.S. 241, 256. As a consequence, many times, the press, in its zeal to capture the most sensational story, oversteps the bounds of fairness and decency by publishing matters which are, arguably, beyond the realm of public concern. When the press resorts to such measures, the subjects of its journalistic fervor are often left needlessly embarrassed and humiliated. Nonetheless, in upholding the integrity of the First Amendment,

> "[t]he choice of material to go into a newspaper, and the decisions made as to * * * treatment of public issues and public officials - whether fair or unfair -constitute the exercise of editorial control and judgment. It has yet to be demonstrated, [however,] how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time." *Id* at 258.

Thus, as will be seen through the course of this opinion, the melange of common law remedies by which individuals could hold the press accountable have been generally eroded over the past several decades as the doctrinal underpinnings of the First Amendment have been interpreted. These interpretations, to resolve the tension between the press and individuals, clearly have been in favor of the press. It is a tenet of this opinion that such is a proper resolution of that tension. Still, by way of preamble and analysis, several of those claims/remedies are highlighted below. In sketching the outlines of the press' First Amendment freedoms it is

stressed that summary judgment is a particularly useful tool in protecting those freedoms, by resolving what are often threshold issues. This is especially so in public official defamation cases, because actual malice must be clearly shown, or summary judgment is proper.

A. INVASION OF PRIVACY

One such avenue of redress available in Ohio is an action for invasion of privacy. Five plaintiffs in this case assert this sort of claim. Ohio courts recognize three versions of invasion of privacy claims.[2] As stated by the Ohio Supreme Court in *Hough*, *supra* at 35, paragraph two of the syllabus:

> "An actionable invasion of the right of privacy is [1] the unwarranted appropriation or exploitation of one's personality, [2] the publicizing of one's private affairs with which the public has no legitimate concern, or [3] the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."

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2 A fourth type of invasion of privacy claim, which arises when the defendant publishes material portraying the plaintiff in a "false light," is not recognized in Ohio. See *M.J. DiCorpo. Inc. v. Sweeny* (1994), 69 Ohio St. 3d 497, 507. False light claims were asserted in this case by plaintiffs Barboza, Case, Early, Kristoff (Little), Smith, and Taylor; defendant was granted judgment on the pleadings as to all of these false light claims by separate entry and opinion dated March 11, 1991.

The Court will separately address the plaintiffs' claims according to the types of invasion of privacy actions they assert.

1. Publication of 'Private Facts

For a plaintiff to sustain a claim for invasion of privacy by the publication of private facts, that individual must provide evidence supporting each of the following elements:

> "(l) There must be publicity; the disclosure must be of a public nature, not private. ***
>
> "(2) The facts disclosed must be those concerning the private life of an individual, not his public life. ***
>
> "(3) The matter publicized must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
>
> "(4) The publication must have been made intentionally, not negligently. ***
>
> "(5) The matter publicized must not be a legitimate concern to the public. A newspaper's publicizing 'legitimate news' ordinarily will not be actionable." *Killilea v. Sears. Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166-67.

Of particular interest is the second element of this

"publicity" tort. Specifically, the facts publicized about a plaintiff must concern his or her *private* life. In other words,

> "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public, such as *matters of public record* about his birth or marriage date, or *matters that the plaintiff leaves open to the public such as kissing his spouse in public.*" (Emphasis added.) *Id.*

This element has special significance because nearly all the facts published about the plaintiffs were gleaned from data obtained via a public records request by the defendant, The Toledo Blade. The Blade, under R.C. 149.43, requested the internal affairs files of the Toledo Police Division.

As a threshold concept, this Court is quick to note that the defendant's public records defense, grounded on Chapter 149, negates many of the private facts claims of the plaintiffs in this case. It does so, simply, by vitiating the tort itself: that is, as a matter of statutory law, many of the facts simply are not private. Moreover, The Blade's public records defense repeatedly implicates the federal constitutional defense - a recurring theme in this opinion.

Indeed, R.C. 149.43 embodies the fundamental principal of promoting discourse about public affairs, as it states:

"(A) As used in this section:

(1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, * * *

(B) All public records shall be promptly prepared and made available for inspection to any person * *."

R.C. 149.011(G) further clarifies R.C. 149.43 by defining a "record" as something "created or received by or coming under the jurisdiction of any public office *** which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Though there are some exceptions to the general rule of availability expounded in R.C. 149.43,[3] this rule is to be broadly construed in favor of disclosure. *State ex rel. Toledo Blade v. Telb* (1990), 50 Ohio Misc.2d 1, 3. Employing these rules, Ohio courts, including the Sixth District Court of Appeals, have consistently found that "'[p]ublic records,' for purposes of 149.43, includes the internal

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3 The specific exceptions iterated in R.C. 149.43(A)(1) include: "* * * medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and appeals to actions arising under that section, records listed in division (A) of section 3107.02 of the Revised Code trial preparation records [and] confidential law enforcement investigatory records * * *."

affairs and civil service records of law enforcement agencies." *Toledo Police Patrolmen's Assn., Local 10 v. Toledo* (1994), 94 Ohio App. 3d 734, 739 (hereinafter cited as "*TPPA, Local 10*"), citing *Telb, supra; Dispatch Printing v. Wells* (1985), 18 Ohio St. 3d 382. App. 3d 734, 739 (hereinafter cited as '*TPPA, Local 10*'), citing *Telb, supra; Dispatch Printing v. Wells* (1985), 18 Ohio St.3d 382.[4]

Many of the plaintiffs' claims in this case hinge upon whether the information disclosed about them was included in public records yet excepted from disclosure. As the *Telb* court explained, "a governmental body has the legal duty to disclose all materials in public records that are not specifically excepted from disclosure by an explicit provision of the public records law." *Telb, supra*, at 4. When excepted materials are contained in public records the custodian of the public records, the governmental body, must still "disclose the non-excepted material, after redacting the excepted materiel." *Id.*, citing *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79. See, also, *Wells, supra*. Noting where the duty to redact is placed is essential because "ascertaining and publishing the

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4 The plaintiffs argue that the internal affairs files compiled prior to the amendment of R.C. 149.43 are exempt from disclosure. This argument is erroneous, however, since the Ohio Supreme Court determined that R.C. 149.43, as amended, "speaks in terms of 'all public records' and makes no distinction for those records compiled prior to its effective date. *** The date the records were made is not relevant under the statute." (Emphasis Added.) *State ex rel. Beacon Journal v. Univ. of Akron* (1980), 64 Ohio St. 2d 392, 396.

contents of public records are simply not within the reach of these kinds of privacy actions." (Footnote omitted.) *Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469, 494 (press's publication of deceased rape victim's name not actionable invasion of privacy when identifying information was available to the public). See, also, *The Florida Star v. B.J.F.* (1989), 491 U.S. 524 (press's publication of sexual assault victim's full name, which was obtained from sheriff's report placed in the department's press room was inactionable); *Strutner v. Dispatch Printing Co.* (1982), 2 Ohio App.3d 377, 379 (press's publication of the name and address of the parents of a murder suspect does not amount to an actionable invasion of privacy when the information published was readily obtainable by the public).

Some might regard Ohio's Privacy Act (R.C. Chapter 1347) as the antithesis of Chapter 149, the public records law, but, of course, it is not. Chapter 1347 protects against the disclosure of certain information that is maintained by a state or local agency in a personal information system, meaning a collection of records from which personal information can be retrieved using the name of the person or some other identifier. See R.C. 1347.01. But, in fact, Chapter 1347 only applies to information that does not fall within the ambit of R.C. Chapter 149. In effect, Chapter 149 supersedes Chapter 1347 as to a wealth of records now deemed public. See *State ex rel Fant v. Enright* (1933), 66 Ohio St.3d 186, 188. Moreover, even where Chapter 149 does not render facts "public," and material may

properly be deemed "personal" under Chapter 1347, the duty to redact such information still rests with the public official or agency that compiled the information. *Id.*

Consequently, if the material published by The Blade about these plaintiffs was exempted from disclosure by some exception to R.C. 149.43, then it was the governmental body's legal duty to redact such items. The Blade, on the other hand, had no legal duty to refrain from publishing such information. Instead, The Blade's only obligation was to exercise its editorial judgment, preferably in a prudent and fair manner. It is debatable whether or not The Blade used good judgment in printing certain portions of the Internal Affairs series, an issue which will be explored later. The failure to make responsible journalistic decisions without more, however, is not actionable.

This basic tenet is further enforced by the protection that arises under the First Amendment to the United States Constitution and attaches to the press's publication of lawfully obtained, truthful information concerning matters of public significance. Specifically, the United States Supreme Court has propounded:

> "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order." (Citations omitted.) *The Florida Star v.*

B.J.F. (1989), 491 U.S. 524, 533.

Dissecting this rule, the applicability of such protection is based on the following three-step inquiry: First, was the published information lawfully obtained? *Id.* at 536. In the *Florida Star* case, the press published the identity of a rape victim, which it obtained from a publicly released police report. The victim's name was contained in the police report despite a state statute prohibiting the publication of the name of a sexual offense victim. In addition, The *Florida Star* published the individual's name in violation of its own internal policy of not disclosing the names of victims of sexual offenses. Although the person's name was not included in an official "public record" which is, by law, subject to inspection by the public, the Court nonetheless concluded that:

> "* * * the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government. Nor does the f act that the Department apparently failed to fulfill its obligation under §794.03 not to 'cause or allow to be * * * published' the name of a sexual offense victim make the newspaper's ensuing receipt of this information unlawful." *Id.*

Following *Florida Star*, this Court can only conclude that the information published by The Blade, which is the subject of the plaintiffs' privacy actions, was lawfully obtained because it was made available, by the

governmental custodian of the information, for inspection by The Blade and the public at large. Even more significantly, the Toledo Police Division's internal affairs files, unlike the police reports in *Florida Star* that were not necessarily subject to disclosure, are "public records" subject to disclosure under R.C. 149.43. See *TPPA, Local 10, supra*. Thus, since public availability is mandated, the receipt of disclosed information cannot be unlawful. *Florida Star, supra*, at 536.

The second step in the inquiry focuses on whether the news article concerned a matter of public significance. In Ohio, a police officer's conduct has been classified, categorically, as matter of public significance. see *Honegger v. Saunders* (Sept. 13, 1988), Hancock App. No. 5-86-18, unreported. In *Honegger*, the Court determined that:

> "* * * information pertaining to the alcohol related automobile accident of a city police officer (whether off duty or not) is, on its face, certainly of legitimate public concern and therefore outside the scope of an invasion of privacy action in Ohio as defined in *Hough v. Peth, supra.*" *Id.*

Along the same lines in the case *sub judice*, all the publications complained of by the plaintiffs concern the conduct of police officers hired to protect and serve the public. Much of the information published bears directly on officers' fitness for duty and how the Toledo

Police Division deals with allegedly improper conduct on the part of its ranks. As such, the information published in the internal affairs series, on its face, relates to matters of public significance which are of legitimate concern to the public.

Plaintiffs contend, however, that although the internal affairs series of articles may, in general, be of public significance, the specific identities of persons revealed in the articles are of no legitimate public concern and should have been kept private. The *Florida Star* case refutes this contention though, as it explains that "public significance" is determined by the article in general rather than the specific identities contained within it. *Florida Star supra* at 536-37. Employing this reasoning, the *Florida Star* court concluded that a newspaper cannot be punished for publishing the identity of a rape victim when that person's name was lawfully obtained and when the article containing the publication involved a matter of great public concern, "the commission, and investigation, of a violent crime which had been reported to authorities." *Id.* at 537, citing *Cox, supra* (article naming victim of rape/murder); *Oklahoma Publishing Co. v. Oklahoma County District Court* (1977), 430 U.S. 308 (article naming juvenile who allegedly committed murder); *Vandmark, supra* (article naming a judge whose conduct was being investigated).

Third, the inquiry turns upon whether imposing liability on the press "serves 'a need to further a state interest of the highest order.'" *Florida Star, supra*, at 537. In *Florida Star*, the Court iterates the legitimate

and significant interests in preserving the privacy of sexual offense victims, but it nonetheless concludes:

> "Where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. * * * Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting, Oklahoma Publishing,* and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." *Id.* at 538.

Likewise, in the case at bar, The Blade received the information it published by way of an R.C. 149.43 public records request. If, by some chance, the custodian of those records failed to redact information that should have remained private, then punishing The Blade for publishing such matter cannot be held to serve a highest order government interest. Consequently, since the material published by The Blade was lawfully obtained and concerned a matter of public significance, and since punishing The Blade for publishing such information would not serve a state interest of the highest order, punishment is constitutionally precluded. *Id.* at 533.

a. Pamela Martz Marok

Plaintiff Pamela Marok's first claim[5] for invasion of privacy by publication of private facts arises from The Blade's article concerning her and her current husband, fellow police officer Edwin Marok.[6] Ms. Marok contends that The Blade invaded her privacy by publishing various facts obtained from her internal affairs file. Specifically, Ms. Marok objects to publication of facts concerning the following: (1) her two week psychiatric treatment and (2) the conclusions of a clinical psychologist hired to evaluate Ms. Marok's fitness for duty as a Toledo police officer when she applied for that position. Ms. Marok also objects to the fact that the reporters working on the internal affairs series took notes from and copied portions of her medical records that were released from The Toledo Hospital to the Toledo Police Division Internal Affairs Unit. The copies of these records were purportedly made available to The Blade's employees for inspection. The Court will now address why Ms. Marok's claims fail with respect to each of these publications.

First, all the aforementioned information was included in Ms. Marok's internal affairs file, a public record, which was available for inspection by anyone, including The Blade. See *TPPA, Local 10, Telb*, and

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5 Ms. Marok also asserts a claim for invasion of privacy by intrusion into seclusion.

6 The article refers to Ms. Marok as Pam Martz because, at the time her internal affairs file was compiled, she was not yet married to Mr. Marok.

Wells, supra. Since the information published about Ms. Marok was gleaned by The Blade from her internal affairs file, a public record, Ms. Marok failed to provide evidence supporting the second element of her invasion of privacy by publication of private facts claim. See *Killilea, supra*, at 166-67. Because the information published was found in a public record it did not concern her *private* life. *Id.* As such, her claim must fail under *Wing, supra*. Moreover, because such information was included in an internal affairs file that was subject to the disclosure requirements of R.C. 149.43, no liability can attach to The Blade's publication of information included therein. See *Cox* at 494 and *Strutner* at 379, *supra*.

Ms. Marok, nonetheless, contends that the published information was private even if found in a public record. She asserts several arguments in support of her position, all of which are flawed.

Initially, Ms. Marok argues that the internal affairs records are not public records. However, our own Sixth District Court of Appeals has recognized such records as public. See *TPPA, Local 10, supra*. Consequently, this argument is unpersuasive.

Ms. Marok also avers that records of incidents dating back to the late 1980's, like those in her internal affairs file, are old and, thus, not newsworthy. As authority for her position, she cites two United States Supreme Court decisions, *Dept. of Air Force v. Rose* (1976), 452 U.S. 352 and U.S. *Dept. of Justice v.*

Reporters Committee (1989), 489 U.S. 749. Rose involved a request, pursuant to the United States Freedom of Information Act ("FOIA") for compelled disclosure of case summaries of honors and ethics hearings at the United States Air Force Academy, with personal references and other identifying information deleted. The FOIA request was filed by New York University law review editors who sought to prepare a law review project on military discipline. *Reporters Committee* also involved a disputed FOIA request, this time for the FBI rap sheet of an organized crime figure. This request was made by certain representatives of the press.

Ms. Marok correctly contends that both of these cases recognize that an individual's privacy interest in records that may have been public at one time increases with time. See *Rose, supra*, at 380-82; *Reporters Committee, supra*, at 767-69. Nevertheless, these cases are inapposite here for several reasons. To begin, both cases involve application of the FOIA, not R.C. 149.43. At the risk of understatement, the FOIA and Chapter 149 are very different public records laws; the FOIA is drawn much narrower than Chapter 149, and is more freighted with exceptions. And, these cases do not create federal privacy rights; rather they aid in analyzing what records may or may not be released under FOIA. In fact, the federal FOIA does not control state public records law, and it is clear to this Court that FOIA does not create any federal privacy right that would preclude or prohibit release under Ohio's statutory catch-all. Given these conclusions, the release

of the Marok records as public records was proper, the doctrines that protect dissemination of publicly available information protect The Blade from liability. Beyond that, even if the release of the information was wrongful, the constitution prohibits the punishment of truthful information that was lawfully obtained.

In addition, both *Rose* and *Reporters Committee* involved disputes over what information could be released within the bounds of the law via a public records request; they did not involve invasion of privacy claims asserted after information has been released. This case, in contrast, involves information that was *already* released pursuant to a public records request. Once the public has been given access to a record, no liability can attach for publication of the facts contained therein. See *Strutner* at 379 and *Cox* at 494, *supra*. As the United States Supreme Court explained, states may not constitutionally penalize the publication of the truthful information contained in records that are open to public inspection. See *Cox* at 495 and *Florida Star* at 533, *supra*.

In *Reporters Committee*, disclosure of the records was denied because the information requested pertained to a private citizen and revealed nothing about the conduct of the agency that compiled and stored the records. This fact is significant because the FOIA, like R.C. 149.43, was designed to promote full agency disclosure. *Reporters Committee*, *supra*, at 754. In this case, unlike in *Reporters Committee*, the information contained in the internal affairs files

revealed much about the conduct of Toledo police officers and the disciplinary procedures of the Toledo Police Division.

The *Reporters Committee* court also recognized that:

> "Although there may be no public interest in disclosure of the FBI rap sheet on one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest -- one that overcomes the substantial privacy interest at stake --in the rap sheet of a public figure or an official holding high governmental office." *Id.* at 761.

Since Ms. Marok, as a police officer, was and is, indisputably, a public official, her privacy interest differed from that of the plaintiff in *Reporters Committee*. See *Waterson v. Cleveland State Univ.* (1994), 93 Ohio App.3d 792, 795 ("plaintiff's employment as a police officer rendered him a 'public official' as a matter of law"). In this regard, the *Reporters Committee* case is distinguishable from the case at bar. For this reason it cannot be relied upon to justify punishing The Blade for publishing truthful information obtained via a public records request.

Finally, in *Rose*, even though the Court recognized a privacy interest that increases with time in records that were previously public, *Rose* does not stand for the proposition that such records are not subject to

disclosure. In fact, the *Rose* court found that no blanket exemption from disclosure applied to the records in dispute, and merely ordered that the records be examined *in camera*, to determine what information should be redacted. See *Rose*, *supra*, at 380-82. In contrast, in the case *sub judice*, the information publicized was already made available for Public inspection. As a result, *Rose* is distinguishable from this case. In sum, Ms. Marok fails to demonstrate how the *Rose* and *Reporters Committee* cases would permit invasion of privacy liability to attach to the publication of information contained in public records that are, by law, available for public inspection [7].

Ms. Marok also argues that the publication of her prehiring evaluation by a psychologist and the records contained in her internal affairs file pertaining to her hospitalization and treatment at The Toledo Hospital

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7 Ms. Marok also attempts to employ the *Rose* and *Reporters Committee* cases to distinguish the *Cox* and *Florida Star* cases, *ante* at 7, 8, from the one at bar. She concedes that "court records of a crime lawfully obtained by the press may be published," but argues that records of non-criminal disciplinary proceedings similarly acquired cannot be published without giving rise to an actionable invasion of privacy. See December 14, 1992 memorandum contra defendant's motion for summary judgment at 24-25. For the reasons just discussed, however, the Court cannot adopt Ms. Marok's thinking, especially since she misinterprets the holdings of the *Rose* and *Reporters Committee* cases and provides no legal support for the proposition that an alleged police misconduct victim or an alleged offender, such as Ms. Marok or Mr. Marok, respectively, should have any greater privacy interest than crime victims, such as those in the *Cox* and *Florida Star* cases. See ante, 7-11.

were private even though they were obtained through a public records request. In support of this argument she cites three cases that have recognized a privacy interest in one's medical records. See *Wilson v. Patton* (1988), 49 Ohio App.3d 150; *Levias v. United Airlines* (1985), 27 Ohio App.3d 222; *Prince v. St. Francis -St. George Hosp., Inc.* (1985), 20 Ohio App.3d 4. These cases, however, are distinguishable from the one at bar because they all involve lawsuits against the individuals or entities that were initially privy to such private information, but who then wrongfully disclosed the confidential material. In other words, the suits were not against the persons who received the wrongfully revealed information, but against the parties that were supposed to preserve the confidentialities. See *Wilson, supra*, (attorney induced nurse at correctional facility to disclose contents of prison medical files - suit against nurse); *Levias, supra*, words, the suits were not against the persons who received the wrongfully revealed information, but against the parties that were supposed to preserve the confidentiality. See *Wilson, supra,* (attorney induced nurse at correctional facility to disclose contents of prison medical files - suit against nurse); *Levias, supra*, (plaintiff flight attendant directed private physician to supply airline's medical examiner with medical information - suit against airline); *Prince, supra*, (treating physician's letter erroneously sent to co-worker of patient's husband - suit against hospital and physicians). This case, in contrast, involves a suit against The Blade, the recipient of information already made available for public inspection by the custodian of the records. As such, the *Wilson*, *Levias*, and *Prince*

cases are inapposite.

With respect to the psychologist's pre-hiring report, Mr. Roe, a Blade reporter, maintains that the report, like the hospital records, was obtained through an open records request to the City of Toledo Department of Human Resources. (See Roe Aff. ¶57 at 16 and appendix L, defendant's Ex. 3.) Ms. Marok does not dispute this fact. Liability simply cannot attach to publication of information readily available to the public. See Restatement of the Law 2d, Torts (1977) ("Restatement") 385, Section 652D at comment b, *Haynik* at 22 and *Florida Star* at 533, *supra*.

Moreover, Ms. Marok's pre-hiring psychological evaluation of her fitness for duty, conducted by Dr. Gregory Forgac, is not a "medical record" exempted from disclosure by R.C. 149.43. See *Telb, supra*, at 10. For such a record to be exempted from disclosure it must be a document "'that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient *and* that is generated and maintained in the process of medical treatment.'" (Emphasis *sic.*) *Id.*, citing R. C. 149.43. The *Telb* court determined that the report of a psychologist that was sought to aid in an employment decision-making process was not a "medical record" exempt from disclosure because it was not generated and maintained in the process of medical treatment, but instead, was a public record subject to disclosure under R.C. 149.43. *Id.* Likewise, following *Telb*, Ms. Marok's pre-hiring psychologist's report is not a medical record, but a public record.

Ms. Marok also contends that Dr. Forgac's pre-hiring report was privileged under R.C. 4732.19 and R.C. 2317.02. These provisions are not applicable here. R.C. 4732.19 [8] applies only when the client, by his or her own volition, is seeking help from the treating psychologist. *In re Smith* (1982), 7 Ohio App.3d 75. Ms. Marok was not seeking help, but had spoken to Dr. Forgac as a precursor to her employment as a Toledo police officer. Moreover, Dr. Forgac's report was not a confidential communication between him and Ms. Marok. It was a report by Dr. Forgac to Ms. Marok's potential employer. R.C. 4732.19 simply does not apply to the report of a psychologist who was hired to evaluate a potential employee's fitness for duty.

Similarly, R.C. 2317.02 [9] is inapplicable because it

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8 R.C. 4732.19 states:

> "The confidential relations and communications between a licensed psychologist * * * and client are placed upon the same basis as those between physician and patient under division (B) of section 2317.02 of the Revised Code. Nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

9 R.C. 2317.02 provides in relevant part:

"The following persons shall not testify in certain respects:

> "(B)(1) A physician or a dentist concerning a communication made to him by his patient in that relation or his advice to his patient* * *."

is an evidentiary rule pertaining to testimony such as that contained in depositions, affidavits, or that obtained in court. In this case, the psychologist was not compelled to testify. His report was obtained under a R.C. 149.43 public records request; thus, the report was publicly accessible. For this reason, publication of a portion of the report does not support a claim for invasion of privacy by publication of private facts.

Ms. Marok also claims to have a privacy interest prohibiting publication of facts regarding the public row between her and Mr. Marok at a Lagrange Street bar. Ms. Marok contends that this privacy interest arises via statute, to protect domestic violence victims, and she cites R.C. 3113.23, R.C. 3113-39, and R.C. 5103.07 in support of her position. These rules, however, are inapposite. R.C. 3113.23 does not exist. R.C. 3113.32 and 3113.39 authorize certain governmental entities to keep domestic violence records and to produce statistical reports from those records. The reports produced, however, must contain no identifying data. These statutes do not apply to records kept by the Toledo Police Division Internal Affairs Unit. Internal Affairs records reflect the questionable behavior of Toledo police officers, whose behavior is of interest to the public the officers were hired to protect and serve. Similarly inapposite, R.C. 5103.07 authorizes the Department of Human Services to administer child welfare and abuse programs. It has nothing to do with the privacy interest of domestic violence victims. The assertion of plaintiff's counsel that each or any combination of R.C. 5103.07, R.C. 3113.32, R.C. 3113.39

and the phantom R.C. 3113.23 is both crabbed and absurd. Consequently, Ms. Marok cannot rely on the aforementioned provisions to demonstrate a privacy interest regarding the public confrontation between her and her current husband.

Even more significantly, Ms. Marok cannot, as a matter of law, base a claim for invasion of privacy by publication of private facts on The Blade's publication of facts concerning a public event. It is well-settled law that "'to state a cause of action for publication of facts concerning his private life, the plaintiff must establish that the matter publicized was not left open to the public eye, but rather, was truly a matter of his private concern.'" *Penwell v. Taft Broadcasting* (1984), 13 Ohio App.3d 382, 384, quoting *Jackson v. Playboy Ent,* (S.D. Ohio 1983), 574 F. Supp. 10, 13. Because the fight between Ms. Marok and her husband took place in public, at a Lagrange Street bar and eventually outside Mr. Marok's home, it was a matter left open to the public eye. Consequently, The Blade's reporting of facts surrounding these public events cannot, as a matter of law, provide the basis for an invasion of privacy action. *Id.* See, also, *Killilea*, *supra* at 166-67 (setting forth elements of invasion of privacy by publication of private facts claim).

Further, given the bizarre behavior described and Ms. Marok's public role as a police officer, the public had a considerable interest in knowing the facts adduced. Those facts sketch a period of imbalance in Ms. Marok's personal and professional life which was

and is disquieting. Her suggestion to the contrary is simply disingenuous.

b. Kimberly Little Kristoff

Plaintiff Kimberly Kristoff, a Toledo police officer, bases her claim for invasion of privacy by publication of private facts on The Blade's June 29, 1990 account of an incident wherein Officer Brian Vasquez, Ms. Kristoff's then boyfriend, assaulted Ms. Kristoff with his unloaded revolver. This article, entitled "Armed and dangerous," focused on the misuse of weapons by Toledo police officers. See June 29, 1990 Blade at 1, 7; Reprint at 15. Ms. Kristoff also objects to The Blade's publication of her photograph along with those of Barbara Alexander and Brian Vasquez, all Toledo police officers. Ms. Kristoff's photo was published in conjunction with an article centering upon domestic violence incidents among Toledo police officers. This article, entitled "When cops' private strife becomes public concern," indicated that Ms. Kristoff and Ms. Alexander were two of no fewer than six women who had accused Officer Vasquez of beating or menacing them. See June 27, 1990 Blade at 4; Reprint at 12. Ms. Kristoff maintains that The Blade's publication of these matters invaded her privacy because she had, for many years, kept the incidents private.

For many of the same reasons that Ms. Marok's claim fails, Ms. Kristoff's claim fails as well. In particular, publication of the matters did not involve

the publication of private facts, and, thus, is simply not actionable. See *TPPA, Local 10, supra*. Because the facts published were not private facts as a matter of law, Ms. Kristoff failed to provide evidence supporting her invasion of privacy by publication of private facts claim; thus, her cause fails under *Wing, supra*. In addition, Ms. Kristoff possesses no special statutory or common law privacy interests as a domestic violence victim that would preclude publication of matters contained in readily accessible public records. See *ante* at 19.

Ms. Kristoff also argues that publication of the aforementioned matters is of no legitimate concern to the public. Since the challenged publications in general were, admittedly, of legitimate concern to the public, the identities contained within the articles are of legitimate concern to the public. See *Florida Star*, *Strutner,* and *Cox, supra*. And, as suggested earlier, newsworthiness is not susceptible to formulaic measurement, word by word or name by name. That determination must be based on overall content! See, generally, *Florida Star, Strutner* and *Cox*.

In this Court's view, thus, the publication of officer Kristoff's name and picture were protected acts by The Blade. This is a far cry, however, from asserting that the decisions to disclose her name and reveal her picture were sound or fair journalistic decisions. Ms. Kristoff was entirely a victim in this sordid episode, and it is difficult to understand why it was necessary to reveal her identity to the community. If The Blade felt

it was relevant that Ms. Kristoff was also a police officer (a strained point at best), she could have been simply identified as a "female police officer." The Blade did not deal fairly or sensitively with Ms. Kristoff. But, unfairness and insensitivity are not automatically actionable in these kinds of cases involving public officials and legitimate public concerns.

c. Jane Lewis

Ms. Lewis bases her claim for invasion of privacy by publication of private facts on The Blade's June 27, 1990 publication of facts surrounding a purported domestic violence incident involving Ms. Lewis and her late husband, former Toledo Police Officer Donald Lewis. In a sidebar highlighting certain "key domestic violence cases," The Blade reported that the incident took place at Jakey's Bar on Adams Street, where former Officer Lewis punched Mr. Mark Bires, who told police that he was attempting to prevent Mr. Lewis from beating his wife. See June 27, 1990 Blade at 4; Reprint at 13. Based on this publication, Ms. Lewis's claim must fail for two reasons.

First, Ms. Lewis contends that the facts published are not true. She maintains that Mr. Lewis was not beating her when he punched Mr. Bires. See *Lewis Aff.* at ¶4. Ms. Lewis's denial of the truth of The Blade's report of this incident negates an element of her claim for invasion of privacy by publication of private facts. See *Leidholt v. L.F.P., Inc.* (C.A.9, 1988), 860 F.2d 890, 895 ("* * * an essential element of [an invasion of

privacy by publication of private facts claim] is that the facts at issue be true"), citing Restatement Section 652D, Special Note at 383. certiorari denied (1989), 489 U.S.1080. See, also, *Strutner*, *supra* at 380 (truth is not a defense to invasion of privacy claims recognized in Ohio because such actions are based on the actual intrusion into a person's privacy rather than the falsity of the information obtained). Consequently, Ms. Lewis's claim fails under *Wing, supra.*

Second, even if the events published were true, Ms. Lewis has failed to provide evidence supporting another element of her invasion of privacy by publication of private facts claim. Namely, she has failed to demonstrate that the events publicized were, indeed, private. on the contrary, the facts published concerned a public incident at a public bar; thus, they did not concern Ms. Lewis's private life. See *Killilea*, *supra* at 166-67. Moreover, the information published was readily accessible in public records, the Toledo Police Division internal affairs files. See *TPPA Local 10, supra*. Because
the matters published did not concern Ms. Lewis's private life, she failed to provide evidence supporting an essential element of her claim for invasion of privacy by publication of private facts; hence, under *Wing, supra*, her claim fails.

Ms. Lewis, like Ms. Kristoff, was entirely a victim in the barroom incident described on day four of the series. Thus one can question the soundness or fairness of the journalistic decision to publish her name in

conjunction with the violence anecdote. This is especially so in light of the facts that the described incident took place roughly eleven years prior to The Blade series; that officer Donald Lewis was investigated and fired as an officer; and that officer Lewis had died almost one year prior to the publication.

But, as with Ms. Kristoff, unfairness is not a basis for recovery for the publication of true anecdotes about public officials involved in areas of legitimate public concern.

d. Linda Lewis Leichty

Ms. Leichty, the first wife of former Toledo Police Officer Donald Lewis, bases her claim for invasion of privacy by publication of private facts on the same June 27, 1990 sidebar that Jane Lewis, Donald Lewis's second wife, based her claim. This publication noted four domestic violence incidents during which Mr. Lewis harmed and/or threatened Ms. Leichty to the extent that she had to summon the police to her home. See June 27, 1990 Blade at 4; Reprint at 13. Ms. Leichty argues that some of these incidents were private; thus, they should not have been disclosed.

Even if some of the incidents took place in Ms. Leichty's home as opposed to in some public place, her claim must nonetheless fail for a number of reasons. First, the information published regarding these events was obtained under an R.C. 149-43 public records request; hence, the information was not private. See

Florida Star, Strutner, and *Cox, supra*. Second, the general import of the article published, which concerned the predisposition of some Toledo police officers to commit acts of domestic violence, was of legitimate concern to the public the officers were hired to protect from violence. Because these two reasons negate elements of Ms. Lewis' invasion of privacy by publication of private facts claim, her cause of action fails under *Wing, supra*.

As with plaintiffs Kristoff and Lewis, Ms. Leichty was also blameless in the incidents described. The incidents relative to Ms. Leichty took place fourteen and fifteen years prior to publication of the series and contributed to the ultimate decision to terminate officer Donald Lewis. And, as noted above, officer Lewis had died almost a year prior to publication.

But, as with Ms. Kristoff and Ms. Lewis, the legal analysis of an invasion of privacy by publication of private facts claim does not involve an evaluation of journalistic fairness.

2. Intrusion Upon Seclusion

A second type of common law invasion of privacy action arises through the intrusion upon the seclusion of another individual. In Ohio, "'[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a

reasonable person.'" *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 145, quoting Restatement, *supra*, Section 652 B at 378. See, also, *Housh , supra* at 35, paragraph two of the syllabus. once again, as with a claim for invasion of privacy by publication of private facts, "* * * there can be no liability for the examination of a public record concerning the plaintiff." Restatement Section 652 B at 379, comment *c*.

Both Ms. Marok and Mr. Marok assert claims for invasion of privacy by intrusion into seclusion. In asserting their claims they object not only to information published by The Blade, but also to information that was merely gathered by Blade reporters.

a. Pamela Martz Marok

Ms. Marok's claim is based on The Blade's June 27, 1990 report of information contained in her records from The Toledo Hospital. Ms. Marok argues that the hospital records were private medical records dealing with her diagnosis and treatment; thus, the information contained within them should not have been delved into and/or made public. The undisputed evidence shows, however, that the records were contained within Ms. Marok's internal affairs file, a public record. See Roe Aff. ¶¶55-56 at 15-16, defendant's Ex. 3. In addition, the file included an authorization to release medical records from The Toledo Hospital to the Toledo Police Division Internal Affairs unit. This release was signed by Ms. Marok. *Id.* at appendix K. Since the information

examined was included in Ms. Marok's internal affairs file, the availability of which was mandated under R.C. 149.43, it did not concern her private affairs; thus, no liability can attach to the examination of it by any member of the public, including The Blade. See *TPPA, Local 10* at 739 and Restatement Section 652B at 379, comment *c, supra.*

b. Edwin Marok

Mr. Marok's claim for invasion of privacy by intrusion upon seclusion is based on one Blade reporter's search for and eventual acquisition of information concerning a sealed/expunged court record of Mr. Marok. Mr. Roe, a Blade reporter, obtained a computer printout of Mr. Marok's criminal history from a confidential source who provided the information on condition that his or her identity be kept confidential. See Roe Aff. ¶51 at 14 and appendix H, defendant's Ex. 3. The computer printout revealed that Mr. Marok was at one time, charged with tampering with evidence. *Id.* at ¶52 and appendix H. Mr. Roe then approached a confidential source who was a court employee to obtain the court records concerning the charge against Mr. Marok. In response to this request, the confidential source informed Mr. Roe that the court records pertaining to the charge against Mr. Marok were "'expunged/sealed' and that the complainant was a 'no show.'" *Id.* at ¶53. Thereafter, Mr. Roe made no further attempts to acquire the records he had sought, and, in fact, never did see any of the court records concerning Mr. Marok's tampering with evidence charge.

Although Mr. Roe did not obtain the information about the charge against Mr. Marok through an R.C. 149.43 public records request, his actions in gathering this material are, nonetheless, constitutionally protected. As the United States Supreme Court explained that:

> "a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources and that the government cannot restrain the publication of news emanating from such sources." (Citations omitted.) *Pell v. Procunier* (1974), 417 U.S. 817, 834.

The Third District Court of Appeals of California further expounded upon this rule of law in *Nicholson v. McClatchy Newspapers* (Cal. Ct. App.1986), 177 Cal. App.3d 509, 519, 223 Cal. Rptr. 58, 63-64. In *Nicholson*, a prospective judicial appointee filed suit against the State Bar of California and two newspapers and their reporters for publishing an unfavorable evaluation of the prospective appointee despite a California law requiring that such evaluations be kept confidential. In following the logic of *Pell* and in determining that liability could not be imposed on the newspapers, the *Nicholson* court concluded that:

> "the news gathering component of the freedom of the press - the right to seek

> out information-is privileged to the extent it involves 'routine *** reporting techniques.' (See *Smith v. Daily Mail Publishing Co., supra*, 442 U.S. at p.103 * * *.) Such techniques, of course, include asking persons questions, including those with confidential or restricted information. * * * Since those activities are protected by the First Amendment, state law may not impinge upon them by characterizing the activities as tortious." *Nicholson*, 177 Cal. App.3d at 519-20, 223 Cal. Rptr. at 64.

Since Mr. Roe, in this case, did no more than question persons who had access to information concerning Mr. Marok's criminal history, he did no more than engage in routine news gathering activities. These activities are constitutionally protected; thus, they cannot provide the basis for Mr. Marok's state law claim for invasion of privacy. See *Id.; Pell* . In fact, Mr. Roe's activities were less egregious than those of the Nicholson reporters because they obtained information that was characterized as confidential under state law. In this case, no evidence has been presented to suggest that Mr. Roe obtained information deemed confidential by law, or that he obtained information in an unlawful manner. Since "[t]here is an undoubted right to gather news 'from. any source by means within the law,'" Mr. Marok's claim for invasion of privacy by intrusion into seclusion fails as a matter of law. See, generally, *Houchins v. KOED, Inc.* (1978), 438 U.S. 1, 11, quoting

Branzburg v. Hayes (1972), 408 U.S. 665, 681-82.

B. DEFAMATION

Consistent with the opposing interests underlying privacy law, freedom of the press and an individual's right to privacy, the common law of defamation embodies the conflict between freedom of speech and of the press and a person's interest in protecting his or her reputation from the publication of defamatory falsehoods. The preservation of one's reputation has long been a societal concern as recognized by the United States Supreme Court, which gleaned the following words from Shakespeare's Othello:

> "'Good name in man and woman, dear my lord.
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.' Act III, scene 3."
> *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 110 S. Ct. 2695, 2702.

It is at least ironic that this of-quoted articulation of the inestimable value of reputation represents, in context, the zenith of insincerity even for the disingenuous and sinister Iago. The lines, spoken to and in manipulation of Othello, ostensibly emphasize Iago's reluctance to

speak disparagingly of either Cassio (arrival of Iago's for military rank and favor), or Desdemona, Othello's wife. An inquisitive and persistent Othello prevails upon Iago to forsake his feigned reticence, however, whereupon he pointedly and falsely tells the Moor that Cassio and Desdemona have been carrying on a torrid affair. This, in turn, leads to Othello's murder of Desdemona; later, when Othello learns of the falsity of Iago's accusations it triggers the Moor's suicide. obviously, the drama and power of Shakespeare's words have long since obscured the spirit of slander and duplicity in which they were spoken.

Ironies aside, the dichotomy between the interests of free speech and protection of personal reputation becomes particularly problematical when the parties involved are a media defendant and a public official plaintiff. Under these circumstances, courts have consistently chosen to preserve the First Amendment freedoms by according extra protections, sometimes at the expense of individual concerns. Such decisions were not made lightly. They were reached only after much debate and balancing. Ultimately, however, the United States Supreme Court has, in a landmark case, *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, concluded that "'public men, are, as it were public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" *Id.* at 268, quoting *Beauharnais v. Illinois* (1952), 343 U.S. 250, 263-264. Moreover, the Court has determined that "'it is a prized American privilege to speak one's mind, although not always with perfect good

taste, on all public institutions, *Bridges v. California* [1941], 314 U.S. 252, 270 * * *, and this opportunity is to be afforded for 'vigorous advocacy, no less than 'abstract discussion'. *N.A.A.C.P. v. Button* (1963), 371 U.S. 415, 429 * * *." *New York Times* at 269. Finally, America's highest court has recognized the "profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* At 270.

This "profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications. Inc. v. Connaughton* (1989), 491 U.S. 657, 686. See, also, *Garrison v. State of Louisiana* (1964), 379 U.S. 64, 74.

Undeniably, by zealously protecting the First Amendment and fostering hearty public debate about the government and public officials, it is inevitable that some untruths will be spread; nonetheless, the Supreme Court has found that this is an acceptable trade-off considering the constitutional objectives of this country's founders. Taking note of this sometimes unpalatable balancing act, the Court pointed out that:

> "Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further

> proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson* (1968), 390 U.S. 727, 732.

Keeping in mind these principles, the law of defamation, as it pertains to public officials and media defendants, departs from the usual common law of libel and slander. In both areas the elements of defamation remain the same. Those elements are "falsity, defamation, publication, injury and fault." *Natl. Medic Serv. Corp. v. E. W. Scripps Co.* (1989), 61 Ohio App.3d 752, 755, citing *Philadelphia Newspapers, Inc. v. Hepps* (1986), 475 U.S. 767; *Gertz v. Robert Welch Inc.* (1974), 418 U.S. 323; *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.* (1974), 43 Ohio App.2d 105, 107. In other words, to prevail on a defamation claim, a plaintiff must demonstrate that there was an "unprivileged publication of a false and defamatory matter about another." *McCartney v. Oblates of St. Francis De Sales* (1992), 80 Ohio App.3d 345, 353.

The similarity between ordinary common law defamation and public official defamation ends at this juncture, however. Under the common law, a private defamation plaintiff could escape having to prove damages and malice on the part of the defendant by demonstrating that the statements at issue were defamatory *par se.* See *Westropp v. The E. W. Scripps Co.* (1947), 148 Ohio St. 365; *McCartney* at 354.

Traditionally, words that tended to injure one in his or her trade or profession have been held to be actionable *per se*. See *Westropp* at 374; *Schoedler v. Motometer Gauge & Eallip Corp.* (1938), 134 Ohio St. 78, 84; McCartney at 353. In contrast, statements that did not overtly reflect on a person in this manner, or that conveyed such an impression through innuendo were characterized as actionable *per quod*. *Becker v. Toulmin* (1956), 165 Ohio St. 549. A plaintiff asserting a claim for defamation *per quod* was required to prove damages. *Id.* at 549, paragraph four of the syllabus. More recently,

> "[t]he common law distinctions between libel per se and libel per quod have become virtually irrelevant in libel actions brought by public officials. What must be proven by a public official plaintiff in a libel suit is clear, i.e. that, by clear and convincing evidence, the alleged defamatory statement was made with actual malice. *New York Times Co. v. Sullivan* (1964), 376 U.S. 254; *Dupler v. Mansfield Journal Co. Inc.* (1980), 64 Ohio St. 2d 116, 413 N.E.2d 1187, cert. denied (1981), 452 U.S. 962. *Liability without proof of fault is no longer available to a public official--plaintiff in light of the actual malice standard of proof.*" (Emphasis added.) *Celebrezze v. Netzley* (August 4, 1988), Cuyahoga App. Nos. 53864, 63865, unreported, Ohio App. LEXIS 3153.

Even with respect to actual malice, public official

defamation strays from the conventional common law and reflects constitutional safeguards engendered by the First Amendment:

> "The concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motives for publishing are irrelevant. * * *". *Varanese v. Gall* (1988), 35 Ohio St.3d 78, paragraph one of the syllabus.

See, also, *Mastandrea v. Lorain Journal Co.* (1989), 65 Ohio App.3d 221, 226. To prove actual malice, a public official defamation plaintiff must show that the defendant published an allegedly defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not". *New York Times Co., supra*, at 279-280. Moreover, the plaintiff must prove actual malice with convincing clarity."[10]

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10 "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established". *Lansdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St.3d 176, 180-81, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

Connaughton, supra, at 659; *Varanese, supra*, at 78, paragraph one of the syllabus. Not only must a plaintiff provide convincingly clear evidence to prevail on a defamation claim, but also he or she is obligated to provide the evidence at summary judgment, upon a defendant's motion. As the Ohio Supreme Court declared:

> "'Summary procedures are especially appropriate in the First Amendment area' due to the potential chilling effect which the threat of a lawsuit may have on the exercise of First Amendment rights. *Dupler, supra*, at 120 * * *. It is for this reason that the plaintiff's burden of establishing actual malice must be sustained with convincing clarity even when the plaintiff's case is being tested by a defendant's motion for summary judgment. *Dupler, supra*, at paragraphs one and two of the syllabus; [*Bukky v. Printing Co.* (1981), 68 Ohio St.2d 45, syllabus.]" *Varanese, supra*, at 80-81.

See, also, *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 254; *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 91. On summary judgment, the law mandates that a judge "view the evidence presented through the prism of the substantive evidentiary burden." *Anderson* at 254. In other words, the question becomes whether a reasonable jury could find "that the plaintiff proved his case by the quality and quantity of evidence required by the governing law * * *", or as in this case, by clear and convincing evidence. *Id.*

Over the years, the United States Supreme Court has clarified and elaborated upon the plaintiff's burden with respect to actual malice in public official defamation cases. In particular, the Court propounded that:

> "Actual malice * * * requires *at a minimum* that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' *St. Amant v. Thompson* [1968], 390 U.S. 727, 730 * ** we have made clear that the defendant must have made the false publication with a 'high degree of awareness of probable falsity, *Garrison v. Louisiana* [1964], 379 U.S. 64, 74 * * *, or must have 'entertained serious doubts as to the truth of his publication,' *St. Amant, supra*, 390 U.S. at 731 * * *" (Emphasis added.) *Connaughton, supra,* at 667.

This standard is a subjective one. *Id.* at 688. In addition, it is a difficult burden to overcome because "it forces a [defamation] plaintiff to prove what was in a reporter's and publisher's mind." *Mastandrea, supra,* at 230. "[T]he focus of inquiry is *not* on the defendant's attitude toward the plaintiff, but rather on the defendant's attitude *toward the truth or falsity* of the statement alleged to be defamatory." (Emphasis *sic.*) *Varanese* at 80; *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 218; *Grau* at 89; *Dupler* at 356. A plaintiff can, however, prove actual malice by

presenting "cumulative circumstantial evidence." *Perk v. Reader's Digest Assn., Inc.* (C.A.6, 1991), 931 F.2d 408, 411. See, also, *Connaughton; Grau* at 89 (in determining whether there was a reckless disregard for the truth, it is important to consider the totality of the circumstances which led to publication of the statement"). Ultimately, "[t]he question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Connaughton* at 685. See, also, *Milkovich v. Lorain Journal Co., supra*, at 2705.

Aside from the stiff burden facing public official defamation plaintiffs on summary judgment, their respective defendants may find solace with other protections as well. One such protection is the "innocent construction rule." "According to this rule, if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted."*Yeager v. Local Union* 20 (1983), 6 Ohio St.3d 369, 372, citing *England v. Automatic Canteen Co.* (C.A.6, 1965), 349 F.2d 989 (alleging that the statement "the Court has appointed a receiver for the assets of the distributor" conveyed the impression that a receiver was appointed for the personal assets of the plaintiff was rejected based on the plain meaning of the word "distributor.") See, also, *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726 (court found that headline and article did not convey the defamatory meaning alleged that plaintiff was a criminal); *Sheppard v. Stevenson* (1964), 1 Ohio App.2d

6 (alleging that publication was intended to convey the impression that plaintiff was responsible for the deaths of 5 people) . Whether a statement is defamatory or not is a question of law for the courts. *Yeager* at 372; *Mendise* at 726; *Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136. "A defamatory statement is one which tends to cause injury to a person's reputation or exposes him to public hatred, contempt, ridicule, shame or disgrace or affects him adversely in his trade or business." *McCartney, supra*, at 353. In determining whether a statement is defamatory, courts must read the allegedly defamatory remark in the context of the entire article. *Mendise* at 726, citing *Shallenberger v. Scripps Publishing Co.* (1909), 20 Ohio Dec., 651, affirmed (1912), 85 Ohio St. 492. In other words, based on the general tenor of the article, would a reasonable fact finder reach a false and defamatory conclusion about the public official? *Milkovich, supra*, at 2707.

Along these same lines, proving the truth of an allegedly defamatory statement provides a complete defense to a defamation action. *Cox Broadcasting Corp. v. Cohn* (1975), 420 U.S. 469, 489; *Shifflet v. Thomson Newspapers, Inc.* (1982), 69 Ohio St.2d 179, 183; *Natl. Medic Serv. Corp., supra*, at 755; *Landrum v. Dombey* (1971), 30 Ohio App.2d 200, 203. One may defend against a defamation action by demonstrating that the allegedly defamatory falsehoods are substantially true or, by justifying the "gist," "sting," or substantial truth of the defamation. *Natl. Medic Serv. Corp.* at 755, quoting Prosser, Law of Torts (4Ed. 1971), 798-799. Moreover, because falsity is an essential element of a

defamation claim, such an action fails when the plaintiff "fail[s] to establish a prima facie case on the element of falsity, i.e., when the record reveals that the published reports were fairly accurate or substantially true." *Id.*

A defendant, in any event, need not resort to proving truth as a defense when the "fair report privilege" applies. In Ohio, the privilege is codified at R.C. 2317.04 and R.C. 2317.05. R.C. 2317.04 protects impartial reports of state and municipal proceedings as well as the products thereof and provides as follows:

> "The publication of a fair and impartial report of the proceedings before state or municipal legislative bodies, or before state or municipal executive bodies, boards, or officers, or the whole or a fair synopsis of any bill, ordinance report, resolution, bulletin, notice, petition, or other document presented, filed, or issued in any proceeding before such legislative or executive body, board, or officer, shall be privileged, unless it is proved that such publication was made maliciously."

R.C. 2317.05 protects impartial reports of certain civil and criminal proceedings, and relevantly provides:

> "The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in

> any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action."

In order to demonstrate that a publication falls within one of the two codified privileges, a defendant must show that the publication is a substantially accurate report of the official record. See *Oney v. Allen* (1988), 39 Ohio St. 3d 103, syllabus; see also, *Young v. The Morning Journal* (1996), 76 Ohio St. 3d 627. A report is "substantially accurate" "if it conveys the essence of the official record to the ordinary reader, without misleading the reader by the inclusion of inaccurate extra-record information or the exclusion of relevant information in the record." *Oney* at paragraph two of the syllabus; see also, *Young* at 628. In the federal common-law vein, the United States Supreme Court has declared that "[a]t the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for publishing information released to the public in official court records." *Cox Broadcasting, supra*, at 496.

As a related issue in the general category of

defamation claims, several of the plaintiffs herein urge that they were defamed by implication and/or innuendo. It will become clear through the course of this opinion that a libel-by-implication plaintiff must prove one of two things: first, that the reporter was aware of the false implication; or second, that the reporter had the requisite disregard toward the falsity of that implication. Because of the subjective nature of these implication or innuendo claims, and because such libel or defamation is squarely within the eye of the plaintiff involved, courts should require a clear demonstration that the two showings have been made. Otherwise, the sharp edges of *Sullivan* become blurred, if not erased. This danger was recognized by the Seventh Circuit almost a decade ago:

> If a public official must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he must also show with clear and convincing evidence that the defendants intended or knew of the implications that plaintiff is attempting to draw from the allegedly defamatory material.

Saenz v. Playboy Ent. (C.A. 7, 1988), 841 F.2d 1309, 1318. It is a considerable leap for plaintiffs to suggest - as several do in this case-that a media defendant may be found liable in a *Sullivan*-type, public official libel case based upon the reporters' lack of sources for unintended

implications, or for implications they did not believe existed.

1. Maryanne Hodak

Ms. Hodak's defamation claims arise out of The Blade's June 28, 1990 article entitled "Errors of judgment that end in tragedy." This article, in part, focuses upon the events surrounding the death of citizen David Plenzler. Those events were outlined in reports of the proceedings before Internal Affairs, Chief Marti D. Felker, and the Toledo Civil Service Commission. Based on those reports, the Blade reported that the night before Mr. Plenzler's death, a neighbor of his called the police to report a disturbance in a nearby apartment. The neighbor also told the officer who took the report that a man kept saying, "You killed me!" That officer did not think the call was an emergency; nonetheless, he dispatched Police Officers Maryann Hodak and Lisa Sepeda to Mr. Plenzler's residence, where they found him, lying on the ground, snoring, with the smell of alcohol on his breath. Despite Officer Hodak's observing a couple of drops of blood on the floor near Mr. Plenzler, she and Officer Sepeda investigated Mr. Plenzler's condition no further. The next day, a relative of Mr. Plenzler found him lying on the floor, mortally stabbed by a steak knife. A photograph of Mr. Plenzler's body was prominently included on the front page of the June 28, 1990 Blade, above the headline of the disputed article. The caption under the photo noted that the picture was taken the morning after police officers were dispatched to Mr.

Plenzler's home.

In addition to these events, the article stated that a subsequent IA investigation found that the officers involved in the aforementioned incident were guilty of neglect of duty. Chief Felker indicated, however, that the officers' conduct did not cause Mr. Plenzler's death. As a result of the IA findings, Officers Hodak and Sepeda were each given ten day suspensions. Those suspensions were subsequently overturned and all the charges against the officers were dismissed by a unanimous vote of the Toledo Civil Service Commission after a full hearing before that body. The Commission concluded that, on the night Officers Hodak and Sepeda were dispatched to Mr. Plenzler's home, there was not enough evidence there to determine that a crime had been committed. In addition to this information, The Blade also reported that Officer Hodak declined to comment on the case. See The Blade, June 28, 1990, at 1, 6.

Essentially, Ms. Hodak argues that four defamatory implications arise out of The Blade's June 28, 1990 report of this incident: (1) that she neglected her duties thereby leading to Mr. Plenzler's death (see May 10, 1991 Amended Complaint ["AC"] at ¶22.A.); (2) that she made an error in judgment that led to Mr. Plenzler's death (*Id.*); (3) that, when she arrived at Mr. Plenzler's home, she saw him in the same state as pictured in the article (see AC at ¶22. B.) ; and (4) that the article was true, accurate, and fair (see AC at ¶22.C.).

As to this latter assertion (i.e., "true, accurate, and fair..."), this Court previously rejected the plaintiffs' motion for summary judgment based on a "true, accurate, and fair" standard for imposing defamation liability. Such a standard does not exist in Ohio, and was not triggered in this case by the so-called "Nichols piece," which appeared on the Op-ed page of The Blade on June 24, 1990. As noted in the factual exposition above, that piece was cloying and sophomoric, but it did not subject The Blade to some new journalistic liability standard on some kind of unexpressed "guaranty" theory. Plaintiffs' repeated assertions in this regard are both absurd and contrary to case law. Moreover, to the extent such assertions are merely claims of defamation, they fail for the overriding reason that such generalized statements as appear in the Nichols piece - while treacly- are not "of and concerning" any person.

a. That Maryann Hodak made an error in Judgment and/or neglected her duty. resulting in the death of Plenzler

With respect to Ms. Hodak's first claim of defamation, The Blade begins by arguing that no reasonable reader could conclude that the article implied that Ms. Hodak neglected her duties, thereby leading to Mr. Plenzler's death because the article expressly states that the Toledo Civil Service Commission unanimously dismissed the neglect charges against her. See The Blade, June 18, 1990, at 6. Moreover, the article further states that even though Chief Felker found Ms. Hodak guilty of neglect of duty,

he did not believe that such neglect caused Mr. Plenzler's death. *Id.* at 1, 6.

Despite these plain statements indicating that Ms. Hodak was cleared of all charges against her stemming from the Plenzler incident, the article is nonetheless sprinkled with suggestions that Ms. Hodak did, in fact neglect her duties. Namely, after discussing the Plenzler incident and the following IA investigatory conclusions, the article states that "when it comes to police work, neglect of duty can be fatal." The article then goes on to explain that "when officers fail to fulfill their responsibilities, however minor, the results can be tragic." Following this statement, the article points to three incidents in which officers, perhaps, "fail[ed] to fulfill their responsibilities." Among the examples highlighted is a reference to the Plenzler incident, where "two officers fail to discover a man has been mortally stabbed." Though an examination of the positioning and use of these statements in and of themselves may suggest that the Plenzler case was a "neglect of duty case," i.e., a case where the question of neglect of duty arose, a thorough and reasonable reading of the article does not convey the impression that Ms. Hodak, by neglecting her duties as a police officer, caused Mr. Plenzler's death. Such a conclusion is averted by The Blade's reporting of the Civil Service Commission's decision and Chief Felker's conclusions.

The Blade also contends that the aforementioned report was a fair and accurate account of the entire set of proceedings against Ms. Hodak in connection with

the Plenzler incident. For this reason The Blade argues that the report is protected under Ohio's fair report privilege. A comparison of the official record of the proceedings against Ms. Hodak and the June 28th article reveals that the article was a fair and accurate report of the official proceedings against Ms. Hodak. See Departmental Investigation Form, Ex. 2, App. R at 001629; the IA charge, *id.* at 001641; Chief Felker's findings, *id.* at 001658-59; the [Raymond J.] Norris affirmation of the Felker findings, *Id.* at 001660-61; and the Toledo Civil Service Commission's dismissal of the charges against Ms. Hodak, *id.* at 001657. Though The Blade's article does not contain a verbatim recitation of the official proceedings against Ms. Hodak, such is not required. See *Oney, supra*, at 106. Because the article is a substantially accurate report of the official reports upon which it was based, it is protected under the fair report privilege as set forth at R.C. 2317.04. See *id.* at 106; R.C. 2317.04.

In opposition to The Blade's motion for summary judgment, Ms. Hodak claims that the fair report privilege is inapplicable because the article is inaccurate. In support of her position she contends that the June 28th article deviates from a previously published Blade article, which *appropriately* explained that Ms. Hodak was cleared of all charges against her stemming from the Plenzler incident. She argues that some words from the 1988 article were modified and a quote from that article was taken out of context to create defamatory implications in the June 28th article. Contrary to what Ms. Hodak seems to be suggesting,

the 1988 article is not the "official report" to which the June 28th article must be compared to ascertain whether the fair report privilege applies. As stated previously, the June 28th article, as it pertains to Ms. Hodak, is a substantially accurate report of the official reports from the proceedings against her. Moreover, it appears that the "context" from which Ms. Hodak claims the Connelly quotes were taken is reporter Murray's notes from the IA records. See Hodak at 001587-001590. Those notes are not an official report or record, but an account thereof. Even if the notes were an official record, the Court nonetheless finds that the quotes contained in the June 28th article constitute a substantially accurate report of the source from which Ms. Hodak contends they were taken. As such, based on these arguments, the June 28th article does not fall outside the fair report privilege.

With respect to Ms. Hodak's second defamation claim, that The Blade implies she made an error in judgment, The Blade asserts three compelling defenses. First, The Blade argues that any allegedly defamatory implication that Ms. Hodak made an error in judgment is a protected statement of opinion. Second, The Blade contends that even if such statement was not a protected opinion, it is nevertheless non-actionable because Ms. Hodak cannot prove that it was false. Finally, The Blade maintains that Ms. Hodak cannot prevail on a defamation claim by pointing out to this allegedly defamatory mark because she cannot prove actual malice in conjunction with the statement. The Court finds the latter two arguments particularly

cogent.[11]

Although there is no special constitutional protection for a statement of opinion, see *Milkovich, supra*, at 2707, constitutional protection does exist for

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11 With respect to the first argument, the United States Supreme Court, in the *Milkovich* case, explicitly stated:

> "We are not persuaded that *** an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich, supra,* at 2707.

Though the *Milkovich* court found it inappropriate to create "an artificially dichotomy between 'opinion' and fact," *Id.* At 2702, the Court reaffirmed its commitment to the following constitutional protections:

> (1) For a statement to be actionable, it must be provable as false, i.e., "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation" receives full constitutional protection. *Id.* at 2706, citing *Philadelphia Newspapers. Inc., supra* See, also *Mastandrea* at 233, citing Yeager at 372 (mere rhetoric or hyperbole is a protected expression of opinion).
>
> (2) Statements that cannot reasonably be interpreted as stating actual facts, e.g., statements of hyperbole, are constitutionally protected. *Milkovich* at 2706, citing *Hustler, Magazine, Inc. v. Fallwell* (1988), 485 U.S. 46.
>
> (3) "[W]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." *Milkovich* at 2706-07.

"a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation." *Id.* at 2706. This is precisely the sort of statement Ms. Hodak alleges is defamatory.

In opposition to the Blade's motion for summary judgment, Ms. Hodak contents that the statement that she committed an error in judgment in connection with the Plenzler incident can be proven false because the Civil Service Commission found her not guilty of all charges against her. Therefore, she argues the statement is not entitled to constitutional protection. Ms. Hodak also provides her own affidavit testimony asserting that she committed no error in judgment. Despite the fact that Ms. Hodak was cleared of all neglect of duty charges, one could still conclude that she made an error in judgment by providing only a cursory examination of Mr. Plenzler on the night she was stabbed. What one perceives as "good judgment" is purely subjective. Since the Blade's article and the statements taken therefrom focused on a matter of public concern-that is, police performance of official police duties-The Blade's subjective statement regarding the topic is constitutionally protected. *Id.* At 2706.

Even if the statement that Ms. Hodak committed an error in judgment in connection with the Plenzler incident was capable of being proven true or false, it is nonetheless non-actionable because Ms. Hodak failed to meet her burden of conjunction with the publication of that allegedly defamatory assertion. Namely, Ms. Hodak

has failed to provide sufficient evidence from which a reasonable jury could find that the statement was false or that it was made with actual malice.

Ms. Hodak does not dispute the vast majority of *facts* printed regarding the Plenzler incident. She does not take exception to the description of her brief investigation at the Plenzler home, the accuracy of The Blade's account of the IA report charging her with neglect of duty and issuing her a ten day suspension, Chief Felker's view of the situation, or the Civil Service Commission's dismissal of the charges against her. See Plaintiffs' Answers to Defendant's First Set of Interrogatories and Requests to Produce to Plaintiff Maryann Hodak ("Hodak Answers") at nos. 12-13. She merely provides her own self-serving, subjective affidavit testimony proclaiming that she committed no error in judgment and points to the Civil Service Commission's dismissal of the charges against her, which, contrary to Ms. Hodak's assertion, did not explicitly state that she made no error in judgment. To meet her burden of proving falsity Ms. Hodak must provide more than a scintilla of evidence in support of that element of her claim. See *Anderson*, *supra*, at 252. Her failure to meet this burden entitles The Blade to summary judgment on this defamation claim.

Moreover, even if Ms. Hodak could prove that The Blade falsely published the statement that she committed an error in judgment with respect to the Plenzler incident, she still has failed to prove, with convincing clarity, that The Blade did so with actual

malice. Aside from the fact that The Blade reporters knew Ms. Hodak was cleared of neglect of duty charges and that they examined The Blade's 1988 report of that fact, Ms. Hodak provides no evidence to demonstrate that The Blade reporters accused her of making an error in judgment with knowledge of that statement's falsity, or with reckless disregard for whether it was true or not.

Ms. Hodak's exoneration from neglect of duty charges does not establish that she made no error in judgment, it merely establishes that the Toledo Civil Service Commission ultimately found that she did not neglect her duties. When facts are reasonably subject to favorable as well as unfavorable interpretations, the media is entitled to draw the negative interpretation from those facts. *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 219. As the Ohio Supreme Court noted in *Perez*:

> "' The fairness of the broadcast is not at issue in the libel suit. Publishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks. The issue in the libel suit is whether the publisher recklessly or knowingly published false material.' *Westmoreland v. CBS. Inc.* (S.D.N.Y.1984), 601 F.Supp. 66, 68. *Id*".

Even "[i]f the suggestion of criminality is a reasonable inference from something a public official has said or done, the media may draw that inference. Such is the

First Amendment's contribution to full, open, and honest government." *Perez* at 219. Ultimately, the media may draw a reasonable inference from the facts available without losing First Amendment protection. *Id.* This Court finds that this is precisely what The Blade did regarding Ms. Hodak's performance in the Plenzler case.

Again, there was nothing provably false in the Blades' account of the Plenzler incident. Moreover, Ms. Hodak has entirely failed to provide sufficient evidence from which a reasonable jury could find the statement to be false; and, she has provided no evidence from which that same jury could find the presence of actual malice.

2. That Maryann Hodak saw David Plenzler in the same scene as depicted in the photo above the headline

Ms. Hodak's third defamation claim arises from The Blade's prominent publication of a photograph of Mr. Plenzler's body above the headline ("Errors of judgment that end in tragedy") of the article discussing, *inter alia,* Ms. Hodak's purported error in judgment with respect to Mr. Plenzler's death. Ms. Hodak maintains that from the use and positioning of this photograph, a reasonable reader could believe that this is the state in which she saw Mr. Plenzler when she visited his home the night before he was found murdered. Ms. Hodak's argument fails, however, under the innocent construction rule. It is undisputed that the photograph is a true and

accurate depiction of the scene at Mr. Plenzler's home the morning he was found murdered. Moreover, the caption under the picture correctly describes the image as, "Body of stabbing victim David Plenzler, morning after police were called to his home." See The Blade, June 28, 1990, at 1. Even though one may surmise that this scene was the same one Ms. Hodak encountered when she visited the Plenzler home one can also reach the reasonable conclusion that the photograph illustrates exactly what the accompanying caption states. Because the caption does not suggest that this is the state in which Ms. Hodak found Mr. Plenzler, but rather plainly describes the photo as depicting the scene the morning after Ms. Hodak was there, the Court must reject the defamatory interpretation under the innocent construction rule. See *Yeager* at 372 and *Mendise* at 726, *supra*. Since use of the Plenzler photograph gives rise to an innocent meaning as opposed to a defamatory one, it cannot support Ms. Hodak's defamation claim. Ms. Hodak's failure to provide evidence in support of an essential element of her claim, i.e., a defamatory statement, entitles The Blade to summary judgment on her claim for defamation in conjunction with the use of the Plenzler picture. See *Wing*, *supra*.

C. That the article concerning Maryann Hodak was true, accurate, or fair

Ms. Hodak's final defamation claim stems from advertisements for the IA series that assert that the articles contained therein are true, accurate, and fair. See Appendix filed Dec. 21, 1992, ("Appendix")

Advertisements at 006746-006750.[12] Ms. Hodak argues that such assertions are false because the article referring to her contained falsehoods about her. In addition, Ms. Hodak contends that the advertising statements were made with actual malice because The Blade purportedly went to extraordinary lengths to create the allegedly defamatory falsehoods contained in the article about her. Ms. Hodak's claim must fail as a matter of federal constitutional law, however, because the advertising statements she points to contained no reference to her either by name or official position; thus, they were not made "of and concerning" her. See *New York Times, supra*, at 288. The United States Supreme Court in *Robsenblatt v. Baer* (1966), 383 U.S. 75, stated that, "[t]here must be evidence showing that the attack was read as specifically directed at the plaintiff." *Id.* at syllabus, paragraph one. "This merely restates the rule that an official may not transmit criticism of the governmental agency for which he works into personal defamation by that simple fact of association alone." *Saenz, supra*, at 1316. See, also, R.C. 2739.01 (plaintiff must demonstrate defamatory matter "* * * was published or spoken of him.") Moreover, the advertising statements professing the truth, accuracy, and fairness of the IA series are not defamatory since they do not facially "tend[ ] to cause injury to a person's reputation or expose[ ] him to public hatred, contempt, ridicule, shame or disgrace or affect[ ] him adversely in

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12 This Appendix may be what plaintiffs refer to as Ex. B since it contains items which, according to plaintiffs, should be found in Ex. B; however, it is not labeled as such.

his trade or business." See *McCartney, supra*, at 353. For these reasons, the IA Series advertisements cannot support Ms. Hodak's defamation claim.

2. Martin Schaber

Mr. Schaber's defamation claims stem from three Blade articles publishing accounts of two incidents in which Mr. Schaber, while placing two citizens under arrest, hit those individuals in their heads with his flashlight, thereby causing them injuries. See The Blade June 24, 1990, section D at 4; The Blade, June 25, 1990, at 1, 6-7. The first article bears the headline "Citizens pay the price of police wrongdoing." See The Blade, June 24, 1990, section D at 4. Preceding that headline, the words "Two decades of crime and cover-up" appear. The article briefly describes an incident in which Mr. Schaber struck Dane Glassford in the face, breaking his jaw. It also states that the City of Toledo entered into $24,000 settlement with Mr. Glassford when he sued that entity as a result of his injuries. *Id.*

The second two articles are found in the June 25, 1990 edition of The Blade. One article appears under the headline: "Police violence: a costly, recurring problem for city." See *Id.* at 1, 6. The other article is preceded by the headline: "Despite IA record, a good street cop." A large photograph of Mr. Schaber on mounted patrol is positioned under this headline. See *Id.* at 7. Above these headlines, the following words also appear: "Brutality? You Decide." See *Id.* at 6-7.

Both June 25th articles discuss the Glassford incident and settlement as well as a second incident arising from Mr. Schaber's arrest of Michael Morin. As with Glassford, Schaber struck Morin with a flashlight, this time causing a head wound that required stitches. *Id.* Although Internal Affairs never investigated the Glassford incident, that entity did investigate the events surrounding the Morin arrest and, as a result, issued Mr. Schaber a written reprimand. *Id.* Mr. Schaber does not dispute The Blade's account of any of these events. See Plaintiff Martin Schaber Answers to Court Ordered Interrogatories of Defendant ("Schaber Answers") at nos. 14-15; Schaber Dep. at 29-30.

Of the two June 25th articles, Mr. Schaber concedes that the second one does nothing to tarnish his reputation. See Schaber dep. at 35-36. That article includes references to the numerous citations for meritorious service Mr. Schaber has received over the years. See The Blade, June 25, 1990, at 7. Even though Mr. Schaber concedes that the second June 25th Blade article referring to him, when considered with the accompanying headline, photograph, and caption, does nothing to injure his reputation, he nevertheless argues that the headline itself defamatory suggests that, although he is a good cop, he has the IA record of a bad cop. The headline alone cannot support Mr. Schaber's defamation claim, however, because defamatory effect is to be determined by a reading of the headline in conjunction with the text accompanying it, rather than from a reading of the headline by itself. See *Painter v. Scripps Co.* (1957), 104 Ohio App.327, 241. Since a

headline, taken out of context, is not "defamatory matter" capable of supporting a defamation claim, Mr. Schaber's claim, based on this headline, must fail under *Wing, supra.*

Mr. Schaber argues that The Blade's account of the incidents in which he struck citizens, coupled with the placement of those accounts beneath the aforementioned headlines, create three defamatory implications: (1) that he used excessive force or was guilty of wrongdoing or his IA file said he was in the arrest of Dane Glassford (see AC at ¶47. A.) ; (2) that he was guilty of repeated beatings (see AC at ¶47. B.) ; and (3) that he was guilty of a cover-up (see AC at ¶47. C) . The record evidence does not, however, support Mr. Schaber's claims.[13]

a. That Martin Schaber used excessive force or was guilty of wrongdoing in the arrest of Dane Glassford, or that Schaber's IA file contained such allegations.

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13 It is noted that defendant filed a motion to strike paragraph 6 of Martin Schaber's December 15, 1992 affidavit. According to defendant, the statement contained in the paragraph (specifically, "I have not beaten citizens, or used excessive force on citizens on any occasions") is directly contradicted by earlier deposition testimony by Mr. Schaber, wherein he indicates that, in fact, he had beaten people on more than one occasion. See 6/3/92 Depo. of Martin Schaber, pp. 33-34; 54. In light of the this Court's decision with respect to defendant's motion for summary judgment, defendant's motion to strike is determined to be moot and will therefore receive no further consideration.

In his first claim, Mr. Schaber argues that The Blade defamatorily implies that he used excessive force and/or was guilty of misconduct or wrongdoing in connection with the arrest of Dane Glassford. He also argues that The Blade falsely implies that such allegations are contained in his Internal Affairs file. Mr. Schaber bases this contention on The Blade's report that he was "one of a handful of officers who, according to Internal Affairs files, has beaten citizens more than once," and by stating that, "Like Officer Schaber, many police officers have to use force in their work. But excessive use of force, Internal Affairs files show, is a costly, recurring and painful problem." See Schaber Dep. at 26-34; The Blade, June 25, 1990, at 1. Essentially, Schaber claims that the aforementioned defamatory implication arises because these statements suggest that his IA file contained a report on the Glassford incident when, in actuality, it did not. See Schaber Dep. at 36-38. Also in support of this claim, Mr. Schaber points to a June 24th headline, "Citizens pay the price of police wrongdoing," which appears above the article mentioning Mr. Glassford's civil case against Schaber and the City and the subsequent monetary settlement of that lawsuit. See The Blade, June 24, 1990, Section D at 4.

Based on a reading of the entire IA Series, no reasonable reader could reach the false and allegedly defamatory conclusion that Mr. Schaber's IA file contained charges of wrongdoing and/or use of excessive force in connection with the Glassford incident. The June 25th article mentioning Mr.

Schaber plainly states that Internal Affairs never investigated the Glassford incident. See The Blade, June 25, 1990, at 6. In addition, both articles state that IA did not even become aware of Glassford's suit over his arrest by Schaber until after the City of Toledo settled that case and then-Police Chief John Mason read about the settlement in the newspaper. See The Blade, June 24, 1990, section D at 4; The Blade, June 25, 1990, at 6. No reasonable person could falsely conclude that Internal Affairs found that "Officer Schaber used excessive force and/or was guilty of misconduct or wrongdoing in the arrest of Dane Glassford" when the articles plainly state that IA never even investigated the Glassford incident. Because a reading of the entire IA series fails to produce the false and defamatory implication alleged, Mr. Schaber has failed to provide sufficient evidence in support of an essential element of his defamation claim. Consequently, that claim, based on this allegedly false and defamatory assertion, must fail under *Wing, supra*.

With respect to the alleged defamatory implication of wrongdoing in connection with the Glassford incident, Mr. Schaber has failed to provide sufficient evidence of actual malice. Schaber admits that The Blade truthfully reported that Glassford sued him and the City because Schaber struck him in the face with his flashlight. In addition, Mr. Schaber does not dispute the fact that the City settled that lawsuit for a monetary sum. Schaber dep. at 29. Based on these facts, The Blade is entitled to infer, whether fairly or

not, that Mr. Schaber engaged in some sort of "wrongdoing" when he made that arrest. See *Perez, supra*, at 219. The mere drawing of a reasonable inference from admitted facts does not establish actual malice on the part of the statement's publisher. *Id.*

As for the allegedly defamatory implication that Schaber used excessive force in connection with the Glassford arrest, Mr. Schaber has failed to provide evidence from which a reasonable jury could conclude, with convincing clarity, that The Blade published such a defamatory implication with actual malice, i.e., with knowledge of the statement's falsity or with reckless disregard for the truth. Mr. Schaber admits that he can point to no evidence that The Blade intended to imply he was guilty of using excessive force to arrest Mr. Glassford. Schaber Dep. at 39. He also admits that he can point to no evidence to support that The Blade implied he used excessive force to arrest Mr. Glassford knowing that such implication was false. *Id.* at 40-44. Plaintiff Schaber even points to reporter Murray's deposition testimony in which he (Murray) avers that he had no intention of suggesting that Schaber used excessive force. Murray Dep. at 187-89. Plaintiff Schaber's failure to provide evidence that the publisher "intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material" defeats a claim of actual malice based on that material. See *Saenz v. Playboy Enterprises Inc.* (C.A.7, 1988), 841 F.2d 1309, 1318.

b. That Martin Schaber is guilty of

repeated beatings

Mr. Schaber's claim that The Blade falsely and defamatorily stated that he is guilty of repeated beatings fails as well. Mr. Schaber bases this claim, once again, on the Blade's statement that he was "one of a handful of officers who, according to Internal Affairs files, have beaten citizens more than once." See Schaber Dep. at 51-53; The Blade, June 24, 1990, at 1. Mr. Schaber asserts this defamation claim despite his admission to beating citizens more than once. Schaber Dep. at 54. He also makes his claim without taking exception to The Blade's account of the Glassford and Morin incidents. See Schaber Answers at nos. 14-15. Instead, Mr. Schaber argues that The Blade's report is false because the reporters did not glean their information entirely from IA records as the report suggests, but instead they used court documents as additional sources. Mr. Schaber admits that The Blade's statement would not be false if the article had attributed the information to the court records considered along with the IA files. Schaber Dep. at 33-34. Such a minor, nondefamatory inaccuracy does not defeat the truth of the statement because it does not "have a different effect on the mind of the reader from that which the pleaded truth would have produced". (Citations omitted.) *Masson v. New Yorker Magazine Inc.* (1991), 501 U.S. 496, 111 S. Ct. 2419, 2432-33. See, also, *Natl. Medic Serv. Corp, supra*, at 755 (with respect to the element of falsity, "[i]t is sufficient to show that the imputation is substantially true"). Because Mr. Schaber has failed to provide

evidence in support of the element of falsity, his second defamation claim must fail. *Wing, supra.*

C. That Martin Schaber is guilty of cover-up

Mr. Schaber's final claim for defamation, that The Blade implied he was guilty of a cover-up, is based on two sources. The first source is the binder heading, "Two decades of crime and cover-up," appearing above the article entitled "Citizens pay the price of police wrongdoing." That article mentions the Glassford incident and the City's payment of $24,000 to settle that claim. See The Blade, June 24, 1990, Section D at 4. The second source is the following statement:

> "Internal Affairs Lt. Michael Navarre says his office did not know about the incident until then-Police Chief John Mason read in The Blade that city council had agreed to pay Mr. Glassford $24,000 so he would drop his $350,000 lawsuit against officer Schaber and the city." See The Blade, June 25, 1990, at 6.

See, also, The Blade, June 24, 1990, Section D at 4 (containing almost identical language).

The Court finds that these passages do not support the defamatory assertion that Mr. Schaber was personally involved in a cover-up of the Glassford incident. First, the June 25th binder heading, "Two decades of crime and cover-up," can easily be viewed as applying to the first article in The Blade IA series,

which begins on the paper's front page and continues onto Section D, pages 1-4. That article is entitled "Secret police files reveal crime, cover-up." See The Blade, June 25, 1990, at 1. It gives a general overview of how Internal Affairs began and how the records of that entity were previously unavailable for public examination. The separate article mentioning Mr. Schaber merely appears on the same page as the conclusion of the general introductory article about IA, which happens to bear a title very similar to the binder heading at issue. Moreover, the article mentioning Mr. Schaber nowhere states that he was involved in a cover-up in the Glassford incident. It just reports the circumstances surrounding Mr. Glassford's suit of Mr. Schaber and the settlement of that case. The binder heading, even when read in conjunction with the June 24th article mentioning Mr. Schaber, cannot reasonably be construed to suggest the false and defamatory implication that Mr. Schaber was personally involved in any sort of cover-up. Since, based on the general tenor of the article, a reasonable fact finder would not reach the false defamatory conclusion asserted, the alleged defamatory innuendo cannot support Mr. Schaber's claim. See *Milkovich, supra*, at 2702. Without defamatory matter, Mr. Schaber's claim fails. See *Wing, supra*.

Similarly, The Blade's June 25th recitation of Lt. Navarre's comment cannot reasonably be said to imply that Mr. Schaber was guilty of any sort of cover-up. The printed words plainly and simply state that IA did not know of the Glassford incident until The Blade printed

an article about it. Under the innocent construction rule, these words are nondefamatory, and thus, nonactionable. See *Yeager, supra*, at 372.

In addition, plaintiff Schaber provides no evidence, aside from the mere publication of the June 24th and 25th articles and headlines, from which a reasonable jury could, with convincing clarity, find that The Blade intended to convey the false and defamatory implication that Mr. Schaber was involved in a cover-up. Consequently, Schaber's claim, based on this assertion fails. See *Saenz, supra*, at 1318.

3. George Taylor

Essentially, Mr. Taylor's claims for defamation arise out of The Blade's June 25, 1990 article entitled: "Role reversal: a repeat victim." See The Blade, June 25, 1990, at 7. This article described an incident in which sixty-seven-year-old Campbell Reasonover sustained a broken arm, allegedly at the hands of Taylor. It also noted that Mr. Reasonover sued the City of Toledo over this incident and received a $25,000 settlement in that action. *Id.* Mr. Taylor argues that The Blade's description of this incident is false and defamatory because Ms. Sherry Jo Gilford, Taylor's partner, broke Mr. Reasonover's arm. Mr. Taylor also objects to The Blade's portrayal of him as "steamed" when he kicked in the door to Reasonover's home. Taylor contends that this statement is false and defamatory because it implies that he was "out of control" during the incident described. Mr. Taylor also claims that such allegedly

defamatory falsities are bolstered by their publication in conjunction with the lead article entitled: "Police violence: a costly, recurring problem for city." See The Blade, June 25, 1990, at 1. Taylor, in addition, bases his defamation claims on certain passages in the June 25, 1990 Nichols article and The Blade's failure to print a list of commendations received by him. See The Blade, June 24, 1990, section E at 5.

Mr. Taylor avers that three defamatory implications arise out of the publications just described: (1) that Officer George Taylor fractured the right arm of Mr. Reasonover or was otherwise guilty of misconduct (see AC at ¶37.A.); (2) that George Taylor is a repeated brutality offender (see AC at ¶37. B.) and (3) that George Taylor may be unfit to be on the police force and has no examples of extraordinary performance (see AC at ¶37.C).

a. That officer George Taylor fractured the right arm of Mr. Reasonover or was otherwise guilty of misconduct

With respect to Taylor's first claim, he argues that The Blade, with actual malice, made the defamatory assertion that he broke Mr. Reasonover's arm or was otherwise guilty of misconduct. The Blade, however, argues that Mr. Taylor's efforts to show actual malice are insufficient as a matter of law. In support of his claim of actual malice, Taylor first points out that Murray, when writing the piece on Taylor, never

contacted Taylor for his version of the Reasonover incident. Taylor argues that if he had been contacted, or if Murray had thoroughly examined Taylor's deposition in or the transcript of Mr. Reasonover's criminal trial for this incident, see Ex. 8 at 43, then Murray would have been alerted to testimony reflecting that Mr. Taylor did not break Mr. Reasonover's arm. In addition, Taylor avers that Murray should have been aware that Reasonover's version of events would be unreliable because Murray was aware of Reasonover's substantial criminal history.

Contrary to Taylor's assertion, actual malice is not demonstrated by the mere failure to interview a witness or by a simple departure from basic journalistic standards. See *Connaughton, supra*, at 688. As the United States Supreme Court declared:

> "A 'reckless disregard' for the truth * * * requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. *St. Amant*, 390 U.S., at 731, 88 S. Ct., at 1325. The standard is a subjective one - there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of probable falsity.' *Garrison v. Louisiana*, 379 U.S. at 74, 85 S. Ct., at 215. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to

> establish reckless disregard. See *St. Amant, supra*, 390 U.S. , at 731, 733, 88 S. Ct., at 1325, 1326." (Emphasis added.) *Id.*

Though Murray arguably strayed from prudent and fair journalistic standards by failing to contact Taylor for his version of the events surrounding the Reasonover incident and by failing to examine certain court documents which may have called into question the accuracy of the sources of information he did consult, these facts are insufficient to support a finding of actual malice with convincing clarity. *Id.*

Taylor attempts to analogize The Blade's allegedly inadequate investigation to the situation in *Connaughton*. In that case, the Journal News, a local newspaper, supported an incumbent candidate for judge whose Director of Court Services was arrested on bribery charges shortly before the election. The charges were precipitated by the opposing judicial candidate, Connaughton, after he conducted a taped interview of Patsy Stephens, who purportedly made cash payments to the Court Administrator to dispose of minor criminal charges against some of her relatives and acquaintances. The taped interview of Stephens was conducted at Connaughton's home in the presence of seven other individuals, including Connaughton and Stephens's sister, Alice Thompson. Later, representatives of the News Journal interviewed Thompson, a witness in the grand jury investigation launched in conjunction with the aforementioned charges. Thompson told the News Journal that, at the

interview at Connaughton's home, Connaughton made various promises to her and Stephens, allegedly "in appreciation" for their help in the investigation. The News Journal interviewed Connaughton regarding the allegations made by Thompson and printed an article reflecting both Thompson's and Connaughton's versions of the purported facts. The *Connaughton* Court found the following facts sufficient to support a finding of actual malice in conjunction with the publication. The News Journal interviewed all the witnesses present at Connaughton's home during the interview of Stephens (these witnesses corroborated Connaughton's version of events), but it did not interview Stephens, the person in the best position to affirm or deny whether Connaughton did, indeed, make promises in exchange for Stephens's testimony. The decision not to interview Stephens was made despite a reporter's repeatedly asking Thompson and Connaughton whether Stephens could verify their conflicting stories. Also, the News Journal deliberately decided not to listen to the tapes of Stephens's interview at Connaughton's home. The Court found that these facts constituted evidence of actual malice, especially since the News Journal supported Connaughton's opponent, and since *all* the witnesses interviewed, except Thompson, affirmed Connaughton's version of the facts.

Connaughton is distinguishable, however, from the case at bar. In this case, The Blade provides undisputed evidence that the sources of information Murray relied on in writing the story about Taylor gave Murray no reason to doubt the version of events he printed. As the

basis for his conclusion that Taylor broke Reasonover's arm, Murray contends that he relied upon (1) a Request for Council Action describing the Reasonover incident and authorizing the payment of $25,000 to settle the civil case stemming from that matter (see Ex. 2 at ¶32, App. G at 006299-301),[14] (2) a review of court files in *Reasonover v. Taylor*, Lucas C.P. No. 85-1905 including the Dismissal Order, Plaintiffs Trial Brief, the defendants' Answer, and documents relating to Reasonover's diagnosis and treatment (see Ex. 2 at ¶¶33-34, App. H); and (3) interviews with Reasonover's grandson, daughter, and son who had repeatedly heard accounts of how Mr. Reasonover's arm was broken despite the fact that they were not witnesses to the events in question (see Ex. 2 at ¶35; Exs. 10, 11, 12). Murray maintains that none of these items or anything else he encountered, from the time he wrote the article about Mr. Taylor until after the reprint was published, gave him any reason to doubt the impression he got from the Request for Council Action that Taylor broke Reasonover's arm. See Ex. 2 at ¶36. Moreover, in his deposition, Mr. Taylor testifies that he has no evidence that the defendants knew the report was false or that they thought it was false. See Taylor Dep. at 76-77. In contrast to the situation in *Connaughton*, where the publishers had reason to doubt the veracity of their publication through the evidence they encountered (namely, six out of eight witness verifying the truth of Connaughton's story and refuting Thompson's allegations), Murray, based on the information he

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14 The request for council action contains *no* denial of liability.

examined, had no reason to doubt the truth of his report. See *Perk , supra*, at 412. Although The Blade arguably could have done a more thorough job of researching the Reasonover incident, "mere negligence [i.e., that The Blade should have known of the alleged falsity] is constitutionally insufficient to show actual malice." *Varanese, supra*, at 82. See, also, *Grau, supra*, at 92 (actual malice cannot be inferred by mere failure to investigate). Essentially, Taylor's argument matches that of the appellee in *Varanese*, and, as the *Varanese* court explained,

> "The thrust of the appellee's argument is that appellant had ready access to information that should have triggered suspicion regarding the truthfulness of the ad or that should have prompted an investigation of its accuracy. These allegations, if true, might raise and issue of negligence, but they do not demonstrate actual malice." *Varanese, supra*, at 83.

Ultimately, without evidence that a defendant "in fact entertained serious doubts as to the truth of his publication" or that he had a "high degree of awareness of * * * probable falsity," the element of actual malice is not supported and the plaintiff's claim must fail. See *Connaughton supra*, at 667. See also, *Wing, supra.* Contrary to Mr. Taylor's assertion, Murray's failure to read the trial transcript, including Sherry Jo Gilford's testimony that she broke Reasonover's arm, does not signify actual malice. Even if Murray arguably should have done further research, Murray's undisputed

testimony demonstrates that he was not aware that this transcript existed until after the reprint was published. See Ex. 2 at ¶37. As stated previously, failure to investigate, without more, does not rise to the level of actual malice. See *Grau*, *supra*, at 92. This rule is all the more compelling, as Murray, according to the undisputed evidence that he did encounter, had no reason to doubt the truth of the article he wrote.

In addition, even The Blade's reprinting of the article referring to Mr. Taylor after Taylor filed his complaint in this case does not constitute actual malice. Mr. Taylor argues that republishing an article accusing him of breaking Reasonover's arm despite his denial of that accusation amounts to a reckless disregard of the truth. Contrary to Mr. Taylor's assertion, "the press need not accept 'denials however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error'". (Citation omitted.) *Connaughton, supra*, at 691, n. 37.

Taylor also contends the account of events surrounding the Reasonover incident was published with actual malice because Murray purportedly wrote the article without relying on any documents or eyewitness testimony that specifically identified Taylor as the officer who broke Reasonover's arm. Nevertheless, all the information Murray did consult in writing the article could reasonably be read as suggesting that Taylor did break Reasonover's arm.

Consequently, Murray's failure to look further for contradictory evidence does not support a finding of actual malice. See *Grau, supra*, at 92.

Also in support of his contention that The Blade published the article about him with actual malice, Taylor points to the description of him as "A *steamed* Officer George Taylor, Jr." who kicked in Reasonover's door. Taylor contends that the use of the word "steamed" exemplifies the authors' reckless disregard for the truth because, when choosing that word, Roe[15] had no evidence of Taylor's state of mind. Taylor argues that this word mischaracterizes his attitude by conveying the impression that he was out of control. See Taylor Dep. at 12. Contrary to Taylor's assertion, the word "steamed" does not mean "out of control." Merriam Webster's Collegiate Dictionary (10 Ed.1993) 1150 defines "steamed" as "angry." Based on the plain meaning of the word "steamed" the Court finds that the impression asserted does not arise since one can certainly be angry without being out of control.

Moreover, even if the word "steamed" conveyed the impression that Mr. Taylor was out of control, the use of that word does not in any way suggest that Murray knew Taylor did not break Reasonover's arm or that Murray doubted that Taylor broke Reasonover's arm. As such, that word choice is not demonstrative of actual

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15 According to Murray, it was Roe who changed the text of the article from Officer Taylor "stormed into the house" to "a steamed Officer Taylor." See Murray Dep. at 326-31, 434-35.

malice. Even looking at the totality of the circumstances, there is insufficient evidence to demonstrate that the aforementioned publication was made with the requisite minimal reckless disregard for the truth. See *Grau* at 89 and *Perk* at 411, *supra*.[16]

b. That officer George Taylor is a repeated brutality offender

Mr. Taylor's second claim, that The Blade defamatorily implied that he was a repeated brutality offender, arises from sources outside the article just discussed. Taylor admits that nothing in criminal record. Murray, however, testifies that what he knew of Reasonover's criminal record did not cause him to doubt the version of events reported, especially since Murray read the Request for Council Action confirming that the city paid $25,000 to settle Reasonover's suit over this incident. the article entitled "Role reversal: A repeat victim" overtly states that he was a repeat brutality offender. See Taylor Dep. at 93-94. Instead, Mr. Taylor suggests that the alleged defamatory implication arises from the Nichols article in which reporter Roe states:

"We pared it down to cases that seemed to affect

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16 Taylor also suggests that Murray should have doubted Reasonover's allegations because of Reasonover's extensive criminal record. Murray, however, testifies that what he knew of Reasonover's criminal record did not cause him to doubt the version of events reported, especially since Murray read the Request for Council Action confirming that the city paid $25,000 to settle Reasonover's suit over this incident.

> the community --- alcohol cases where officers were carrying guns, *repeated brutality offenders*, domestic violence cases that turned into public brawls, neglect of duty cases." (Emphasis added.) The Blade, June 24, 1990, section E at 5.

Mr. Taylor's claim, based on this assertion, fails as a matter of law for two reasons.

First, under the innocent construction rule, the Court is obliged to adopt the innocent rather than defamatory meanings of words. Although one might conclude that Mr. Roe's quote amounts to an all inclusive list of categories into which each person mentioned in the series would fall, one may also interpret the quote as a description, by example, of some of the topics to be dealt with in the series. Based on a reading of the entire series, the latter, nondefamatory interpretation prevails under the innocent construction rule. See *Yeager*, *supra*, at 372. Moreover, the latter interpretation is patently more reasonable since the IA series includes, in addition to articles touching on the categories mentioned, articles about the history of the Internal Affairs department, sexual harassment and misconduct, accidental shootings and the TPPA Lounge, to name a few. Further, this Court concludes - from a reading of the entire report - that the statement was not susceptible of a defamatory construction. Thus, Taylor's claim fails on two bases: 1) a reading of the entire series compels the conclusion Roe's statement was not defamatory, and - in any event- 2) the statement is susceptible of an

innocent construction, even if an alternative defamatory construction were possible.

Second, Mr. Taylor's claim, based on the Nichols article, fails because that article contains no defamatory matter "of and concerning" him. The Nichols article nowhere mentions Mr. Taylor by name or identifies him as failing into one of the aforementioned categories; therefore, it cannot support his defamation claim. See *New York Times Co., supra*, at 288; R.C. 2739.01.

C. That George Taylor may be unfit to be on the police force and has no examples of extraordinary performance

Mr. Taylor's final defamation claim can be separated into two parts: (1) that he may be unfit to be on the police force and (2) that his record contains no examples of extraordinary performance. The first part of Taylor's defamation claim is based on one passage from the Nichols article and one line from the article discussing Reasonover and Taylor. In the Nichols article one particularly striking file was highlighted. Describing the contents of that file, Nichols reported that Murray recalled, "In that one file we saw brutality, domestic violence, drugs, and sexual imposition, and this guy was still on the force." See The Blade, June 24, 1990, section E at 5. In the article about Mr. Reasonover and two of his altercations with Toledo Police, The Blade described how Taylor purportedly broke Reasonover's arm and reported that "[Taylor] is

still a Toledo police officer." See The Blade, June 25, 1990, at 7. Mr. Taylor avers that these two passages, when read together, falsely and defamatorily suggest that Taylor should not be on the police force.

Taylor's arguments, with respect to this alleged defamatory import, are unavailing for two reasons. First, the initial passage cannot be interpreted as referring to Mr. Taylor. No name is mentioned in that reference and, moreover, the contents of that file, as recited, in no way correspond to the reported contents of Taylor's file. Hence, no reasonable reader could conclude that Taylor was the unnamed officer described in the Nichols article. Since the initial allegedly defamatory report was not made "of and concerning" Mr. Taylor, it is not actionable. See *New York Times, supra*, at 288.

Second, under the innocent construction rule, the two passages cited can innocently be interpreted as merely reflecting the current employment status of Mr. Taylor and the other unnamed police officer. See *Yeager, supra*, at 372. The words "still on the force," according to their plain meanings, do not suggest that Taylor should not be a police officer. In fact, The Blade provides the affidavit testimony of Murray and Roe to explain that they were simply reporting the current employment status of the police officers written about. See Ex. 2 at ¶19, Ex. 3 at ¶20. Consequently, taking the innocent meaning over the defamatory one, these passages are non-defamatory and, thus, non-actionable. *Id.*

In addition, both Murray and Roe provide uncontroverted affidavit testimony that they never intended to imply that Taylor should not be on the police force. By failing to provide evidence of intent to imply or knowledge of the defamatory implication alleged, Taylor has failed to provide evidence of actual malice sufficient to withstand a summary judgment motion. See *Saenz*, *supra*, at 1318.

Mr. Taylor bases the second portion of his final defamation claim on the following passage from the Nichols article in which Murray was quoted as saying, "We recognize that cops screw up, but we also know that they do a lot of good things *** [s]o we went through all the police personnel files looking for examples of extraordinary performance." See The Blade, June 24, 1990, Section E at 5. Taylor claims that this passage falsely and defamatorily suggests that he has no examples of extraordinary performance in his file because the article mentioning him did not point out that he, in fact, had two commendations in his file, which Roe and Murray knew about. He argues that this allegedly false and defamatory implication is further exacerbated by the fact that The Blade reported the commendations found in Mr. Schaber's file.

Contrary to Mr. Taylor's assertion, the implication that Taylor has no examples of extraordinary performance in his file is not defamatory even if it could be gathered from The Blade's failure to list Taylor's commendations. "A defamatory statement is one which tends to cause injury to a person's reputation

or exposes him to public hatred, contempt, ridicule, shame or disgrace or affects him adversely in his trade or business." *McCartney, supra*, at 353. See, also, *Natl. Medic, Serv. Corp., supra*, at 755. Even if the alleged false implication arose in the aforementioned context, the absence of commendations or examples of extraordinary performance in one's file does not necessarily reflect adversely on a person in his or her trade or business, nor does it expose a person to public hatred, contempt, ridicule, shame, or disgrace. At most it suggests that the individual's performance is ordinary rather than extraordinary. As such, the implication alleged is not actionable because it is not defamatory. See *Natl. Medic. Serv. Corp.* at 755 ("To survive a motion for summary judgment in a libel action, the plaintiff must make a sufficient showing of the existence of every element essential to its case. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317").

In addition, the plain meaning of the statement that Murray and Roe "went through all the police personnel files looking for examples of extraordinary performance" does not suggest that the reporters intended to write about all the examples of extraordinary performance in those files. Consequently, the omission of commendations contained in the files of the police officers written about does not falsely imply that those officers had no commendations in their records. Because the false implication alleged cannot be gathered from the plain meaning of the words cited, Taylor's claim fails on the essential element of falsity. See *Wing, supra*.

Finally, even if the alleged false implication could arise from the aforementioned statements and omissions, Taylor has failed to provide any evidence of defamatory intent. Murray provides uncontroverted affidavit testimony that, in making the aforementioned statement, he was "merely describing an aspect of (his] research [and] did not intend to imply that Robert Barboza or any other officer has no example of extraordinary performance." See Ex. 2 at ¶18. By failing to provide sufficient evidence of defamatory intent, Taylor's claim fails as a matter of law. See *Saenz, supra*, at 1318.

4. Robert Case

Mr. Case's defamation claims arise out of The Blade's June 25, 1990 article highlighting a few "key cases" in which citizens alleged that police officers used excessive force against them. See The Blade, June 25, 1990, at 7. According to the IA series overview on June 24th and the binder headings for June 25th, the June 25th articles were billed as follows: "Brutality? You decide." See The Blade, June 24, 1990, section D at 4. The lead article for June 25th bore the headline, "Police violence: a costly and recurring problem for city." See The Blade, June 25, 1990, at 1,6. That article preceded the article pertaining to Mr. Case, which was entitled "Other key cases." Directly below the article's title, the following enlarged, descriptive passage appeared: "The police division's Internal Affairs files confidential until recently - detail 886 citizen *allegations* of excessive force. Other cases are documented in court records."

(Emphasis added.) See The Blade, June 25, 1990, at 7. The portion of the "Other key cases" article discussing Mr. Case's conduct describes an incident in which Case, while booking seventy-year-old William Eichenlaub on a driving while intoxicated charge, purportedly dislocated Eichenlaub's elbow. The article also states that Mr. Eichenlaub sued Case and the City over this incident, and that the City settled the lawsuit for the amount of Eichenlaub's medical bills. In addition, the article mentions that IA never investigated this incident and that Case is still on the force. *Id.*

Mr. Case objects to The Blade's account of this incident, claiming that he neither broke Mr. Eichenlaub's arm nor used excessive force in the arrest and booking procedure. Case argues that, because the article conveys the impression that he used excessive force to arrest Eichenlaub, it is false and defamatory. In addition, Case contends that the article, by its placement in a collection of articles about police brutality, defames him by categorizing him as a repeated brutality offender. *Id.* at 6-7. Case, like Taylor, also argues that the series and article, when read together, falsely suggest that he has no examples of extraordinary performance in his file and that he is unfit to be on the Toledo police force. See *Id.* at 7; The Blade, June 24, 1990, section E at 5.

Based on the aforementioned publications, Mr. Case argues that three specific defamatory implications arise: (1) that Sgt. Robert Case used excessive force on William C. Eichenlaub and that the article is fair (see

AC at ¶42.A.); (2) that Sgt. Robert Case is a repeated brutality offender (see AC at ¶42.B.); (3) that Robert Case may be unfit and has no examples of extraordinary performance in his personnel file (see AC at ¶42.C.).

a. That Sgt. Robert Case used excessive force on William C. Eichenlaub and that the article is fair

In support of its motion for summary judgment on this claim, The Blade proffers two compelling arguments. First, The Blade argues that its account of the Eichenlaub incident is protected under the fair report privilege. Mr. Case fails to address whether the fair report privilege applies to this claim; nevertheless, the Court will address the applicability of this privilege to the instant facts. As noted earlier in this opinion, R.C. 2317.05 protects the fair and impartial report of the contents of documents filed in a court of competent jurisdiction, so long as the publication was not made maliciously. See *ante* at 41-42. Also, for this statutory privilege to apply, the report must convey "the essence of the official record to the ordinary reader, without misleading the reader by * * * the inclusion of inaccurate extra record information or the exclusion of relevant information in the record." see *Oney, supra*, at paragraph three of the syllabus.

In opposition to The Blade's motion for summary judgment, Mr. Case argues that the article referring to him is not substantially accurate because it includes misconduct allegations and present day assertions by

Mr. Eichenlaub. He also argues that the article falsely implies that he used excessive force on Mr. Eichenlaub and that this conclusion arises because the "Other key cases" article was preceded by an article with the headline, "Police violence: a costly and recurring problem for city." See The Blade, June 25, 1990, at 1, 6. In addition, Mr. Case objects to the following description of how Mr. Eichenlaub's injury purportedly occurred:

> "While waiting in the booking line, Sergeant Case pulls on the man's left arm, dislocating his elbow according to a lawsuit filed against the officer and the city. 'He took the handcuffs off me, but he grabbed my left arm, and he put a hammer lock on me,' Mr. Eichenlaub now says. 'He just gave my arm a yank up and popped it out of the socket.'" *Id.* at 7.

Case maintains that this account of the Eichenlaub incident is false because he neither pulled on nor broke Mr. Eichenlaub's arm. See Appendix, Case, Case Aff. at ¶3.

With regard to the fair report privilege, it is immaterial whether Case actually broke Eichenlaub's arm. What is material is that The Blade fairly and accurately reported the allegations, gleaned from government-provided information or judicial proceedings. See R.C. 2317.05

Though Case argues that the printed *allegations* are

false he nevertheless admits that the first part of the description, that Case pulled on Eichenlaub's arm and dislocated Eichenlaub's elbow, is a true account of the allegations contained in Eichenlaub's civil suit against Case and the City, *Eichenlaub v. City of Toledo, et al.*, Lucas C.P. No. 85-1469. See Case Dep. at 26-27. In addition, the second portion of the allegedly false and defamatory passage, which states that Case put Eichenlaub in a hammerlock, accurately reflects the allegations in Eichenlaub's proposed jury instructions filed in Case No. 85-1469. See Ex. 2, ¶23, App. D, at 005353. This portion of the passage also accurately reflects Eichenlaub's present day reiteration of the allegations in the lawsuit, which Murray relied on in writing the article. *Id*, at ¶25, App. F. In *Ratliff v. McGlamery* (Nov. 23, 1988), Lorain App. No. 4387, unreported, the court determined that reliance on a party's clarification of his or her claims in a lawsuit does not remove the account of such clarification from the R.C. 2317.05 privilege. In *Ratliff*, it was the party's attorney that made the clarification, but this Court finds that the privilege should similarly extend to a party's own clarification of his or her legal claims.

Ultimately, a comparison of the court documents and information Murray relied on in writing this article with the article itself reveals that the entire report about the Eichenlaub incident and the ensuing lawsuit is substantially accurate. See The Blade, June 25, 1990, at 7; Ex. 2, ¶¶23, Apps. D, F. The article does state that the IA files and court records examined revealed "*allegations* of excessive force." See The Blade, June 25,

1990, at 7. In addition, Murray truthfully attributes the description of the incident to information found in the filed lawsuit and gathered from Mr. Eichenlaub. *Id.* Finally, the article accurately states that Eichenlaub's $400,000 lawsuit was settled for $10,696, the amount of Eichenlaub's medical bills.

Arguably, The Blade could have further expounded on the settlement terms by explaining that, often, settlement for the amount of medical bills alone, without any compensation for pain and suffering, is indicative of a weak liability case. Also, The Blade could have written a fairer article by interviewing case and including his side of the story in the report, especially since the Request for Council Action states that, although the City settled Eichenlaub's civil suit, Case and the City continued to deny that excessive force was used in Eichenlaub's arrest or booking. See Ex. 2, ¶23, App. D at 005341. Though these omissions may strain the outer limits of fairness, they do not implicate the fair report privilege. Indeed, they do not mislead the reader about the ultimate import of the story, i.e., that Eichenlaub sued Case and the City over Case's *alleged* use of excessive force in Eichenlaub's arrest and booking, and that the City settled that lawsuit for the amount of Eichenlaub's medical costs. Because the article is "substantially accurate," it does not fall outside the R.C. 2317.05 fair report privilege on this basis. See *Oney, supra*, at paragraph three of the syllabus.

In addition, it is important to note that The Blade

never states that Case used excessive force against Eichenlaub. Instead, the article merely states that internal affairs and court documents contain allegations of excessive force. See The Blade, June 25, 1990, at 7. Because the materials Murray examined do contain the allegations reported, the article, to this extent, is truthful, and thus, not actionable. See *Cox Broadcasting Corp.* at 489, *Natl. Medic Serv. Corp*, at 755 and *Shifflet* at 183, *supra*.

The Court will now turn to The Blade's second cogent argument in favor of summary judgment on Mr. Case's first claim. With respect to this allegedly defamatory implication, The Blade argues that summary judgment should be granted in its favor because Case has failed to provide sufficient evidence of actual malice. To withstand summary judgment on the issue of actual malice, Case must, at a minimum, provide evidence from which a jury could find, with convincing clarity, that The Blade published its report about him with "a high degree of awareness of * * * probable falsity," or that it "in fact entertained serious doubts as to the truth of [its] publication." (Quotations omitted.) *Grau, supra*, at 731. Case can meet this burden by making the requisite showing based on the totality of the circumstances leading to publication of the allegedly defamatory statements. *Id.*

To the extent that The Blade implies that Case actually used excessive force in the arrest and booking of Eichenlaub, Case attempts to demonstrate actual malice in connection with this publication by

presenting circumstantial evidence to suggest that The Blade had a high degree of awareness of the falsity of this implication. In addition, he attempts to demonstrate that The Blade deliberately avoided the truth in publishing the article about him by failing to contact him or the City's attorney for his side of the story. He argues that these failures on the part of The Blade are particularly egregious in light of the following facts: (1) The Blade had his phone number and address and, thus, could have contacted him, (2) The Blade contacted other police officers for comment on the stories to be published about them, (3) The Blade was aware, via its examination of the Request for Council Action, that Case continued to deny using excessive force against Eichenlaub even after the settlement, and (4) that advertisements billed the IA series as "more than fair." Case also argues that Eichenlaub's deposition and a doctor's testimony from Case No. 85-1469 should have signaled to The Blade that Mr. Eichenlaub's allegations were false. Relying on *Connaughton*, Case argues that, based on all these factors, The Blade acted with actual malice by recklessly disregarding and deliberately avoiding the truth. See *Connaughton*, *supra*.

The Court, however, finds Case's arguments unavailing for a number of reasons. First, with respect to Eichenlaub's deposition from Case No. 85-1469, Case points to a portion of Eichenlaub's deposition in which Eichenlaub states that he told a bank teller that his injury occurred as a result of a car accident. See Appendix, Case, Eichenlaub Dep. at 37-38. This isolated

statement, however, is unremarkable. Murray presents uncontradicted testimony that he does not recall reading Eichenlaub's deposition from Case No. 85-1469. As such, that solitary contradiction could not have triggered Murray's suspicions if Murray was unaware of it. See Murray Dep. at 480; Ex. 2, ¶¶23-25. Even if Murray neglected to read Eichlaub's deposition from Case No. 85- 1469 when a reasonably prudent person would have read it, that failure does not establish a reckless disregard for the truth. See *Connaughton*, at 688 (failure to investigate before publishing is insufficient to establish reckless disregard). Moreover, based on all the documents and information Murray did consider in writing the story, Eichenlaub consistently stated that his arm was injured by Case during booking. See Ex. 2, ¶¶23-25. Also, a review of the doctor's deposition testimony in Case No. 851469 does not suggest that Mr. Eichenlaub's injury could not have been caused by the mechanism Eichenlaub alleged, namely, through Case's use of excessive force. See Ex. 2, ¶24, App. E, at 005370, 005381-005384.

Ultimately, a review of all the evidence highlighted by Case and all the material considered by Murray in writing this article does not support the conclusion that Murray deliberately avoided the truth in writing the article about Case. This finding remains undisturbed even though Murray did not contact Case or his attorneys for Case's side of the story. See Ex. 2, ¶¶23, 24, 25. Failure to contact a libel plaintiff about the allegations made against him does not constitute negligence, let alone actual malice. See *Horvath v.*

Ashtabula Telegraph (Ohio App.1982) 8 Media L. Rep. (BNA) 1657, 1663.

Similarly, even looking at the totality of the circumstances leading to publication, the record contains insufficient evidence for a jury to conclude, with convincing clarity, that Murray, in fact, doubted the truth of the alleged implication that Case used excessive force against Eichenlaub or that Murray had a high degree of awareness of that implication's probable falsity. Moreover, Case admits that he has no evidence that Murray knew the information printed about Case was false, see Case Dep. at 32-34, 36-39, 40, 42-43, and Murray provides undisputed affidavit testimony that he did not doubt the truthfulness of the information he printed, Ex. 2, ¶31.

As a final consideration, Murray testifies that he never intended to imply that Case used excessive force against Eichenlaub. *Id.* at ¶22. Case provides no contradictory evidence to suggest that Murray did intend to convey the defamatory implication alleged. Without evidence of intent to convey the alleged defamatory implication, case's claim fails as a matter of law. See *Saenz, supra,* at 1318.

b. That Sgt. Robert Case is a repeated brutality offender

In support of his argument that The Blade implied he was a repeated brutality offender, Case offers the same arguments as Taylor. See AC at

¶¶37.B., 42.B. Just like Taylor, Case bases his claim on a portion of the Nichols article in which Roe explains that, after having looked at thousands of files, "we pared it down to * * * repeated brutality offenders." See The Blade, June 24, 1990, section E at 5. From this single sentence in an eight day series! Case argues that The Blade implies he is a repeated brutality offender. Case also suggests that the series articles from June 25th imply that he, along with the other officers discussed, was a repeated brutality offender.

Case's claim based on this alleged defamatory implication must fail. Nowhere does the series state that Case is a repeated brutality offender. Case even admits this fact. See Case Dep. at 102, 104. In fact, the article about him mentions only one incident from which any use of excessive force on Case's part could possibly be inferred. See The Blade, June 25, 1995, at 7. In addition, since Case's claim that The Blade implied he is a repeated brutality offender is identical to and based on the same arguments as Taylor's claim, Case's claim fails for the same reasons that Taylor's claim failed. See *ante* at 71-73. Moreover, Murray supplies unrefuted affidavit testimony that he neither intended to imply nor believed that the series would imply that Case was a repeated brutality offender. See Ex. 2, ¶27. Without evidence of intent to convey the defamatory implication alleged, Case's claim fails as a matter of law. See *Saenz, supra*, at 1318.

C. That Robert Case may be unfit and has no examples of extraordinary performance in

his file

Just as with Case's last claim, that The Blade implied he is unfit to be a police officer and has no examples of extraordinary performance in his file, this claim is virtually identical to and based on the same arguments as those proffered by Taylor. See AC ¶¶42.C.; 37.C. The only difference between the claims of these two men is that Case points to more examples of extraordinary performance in his records, which Murray had access to and examined before writing the article about Case. Ex. 2, ¶24, App. E. The Court, nevertheless, finds this distinction immaterial and finds that The Blade is entitled to summary judgment on Case's claim for the same reasons it was entitled to summary judgment on Taylor's parallel claim. See *ante* at 73-76. In addition, Case's claim must fail because he provides no evidence refuting Murray's assertion that he neither intended to imply nor believed that the Series would imply that Case was unfit to be a police officer or that he had no examples of extraordinary performance in his file. See Ex. 2, ¶¶28, 29. According to *Saenz*, without evidence of intent to convey the defamatory implication alleged, Case's claim fails as a matter of law. See *Saenz*, *supra*, at 1318.

5. Robert Barboza

Robert Barboza's defamation claims are based primarily on the IA series articles printed on Saturday, June 30 and Sunday, July 1, 1990. According to the Series overview of June 24, 1990, the articles on June

30th were to address the topic of "Cops, Drugs, and Alcohol." See The Blade, June 24, 1990, section D at 4. The article addressing Mr. Barboza's conduct is entitled "Drink, drugs: a problem in blue" and appears on the first page of the June 30th Blade. Mr. Barboza is one of three police officers whose photographs appear directly under that headline. The article begins by describing how each pictured officer was saddled with IA charges for having been involved in a drug or alcohol-related incident. The article continues on page 6 of the June 30th Blade, where it further elaborates on the incident involving Mr. Barboza. Under the subheading, "Rookie gets an unexpected ride," The Blade describes how Mr. Barboza, while on duty, took his rookie partner to a pool party at a fellow officer's home. While his rookie partner waited in the police vehicle for an hour and a half, Barboza remained in the back yard of the home and consumed alcohol with his friends until his partner retrieved him. While his partner drove the patrol car and responded to a few police calls, Mr. Barboza inappropriately touched her, shouted profanities out the car window, and beat the side of the car with his night stick. He then took control of the police vehicle, driving it through residential neighborhoods at 62 miles per hour and nearly flipping it over twice. Eventually, Barboza was taken to the Lucas County Jail where he registered a .18 on the breathalyzer. As a result of this incident, Mr. Barboza was charged with intoxication and conduct unbecoming an officer and was suspended for 20 days. See The Blade, June 30, 1990, at 1, 6. Mr. Barboza does not deny the substantial truth of The Blade's report of this incident; however, he does object

to The Blade's omission of certain allegedly relevant facts from the report. Barboza also finds fault with The Blade's publication of his former badge number, 666, in this article.

In addition to describing Barboza's pool party incident, the June 30th Blade highlights other incidents involving various police officers' use of drugs and/or alcohol. See The Blade, June 30, 1990, at 6-7. Above these accounts, the following headline appears: "Case after case, Internal Affairs records show substance abuse." *Id.* on page 6, an illustration of the silhouette of a police officer drinking out of a liquor bottle appears inside a larger liquor bottle. See *Id.*

Mr. Barboza also bases his defamation claims on a July 1st article appearing under the general heading, "Past problems, future solutions." See The Blade, July 1, 1990, at 1. This article, entitled "Are we hiring the best?" reiterates the Barboza pool party incident and reveals that Barboza was hired as a Toledo Police officer despite his having been arrested three times for drunk and disorderly conduct and once for resisting arrest. *Id.* at 1, 6. Again, Barboza does not deny the truth of the facts printed about him.

Although Barboza does not deny the literal truth of any of the facts printed about him, he does maintain that defamatory implications arise via The Blade's inclusion of those facts in articles about substance abuse in the Toledo police force, via its exclusion of other pertinent information, and via its inclusion of

certain facts and words knowingly selected to create a defamatory innuendo. Specifically, Barboza argues that the following defamatory implications arise: (1) Robert Barboza has a substance abuse problem requiring a treatment program or has one of the three worst substance abuse problems on the force or drinks alcohol straight from the bottle (see AC at ¶17.A.); (2) Robert Barboza has some association with the devil or beast (see AC at ¶17.B.); (3) Robert Barboza has such an extensive drinking problem that he shouldn't have been hired as a police officer (see AC at ¶17.C.); (4) Robert Barboza has no examples of extraordinary performance and there is a question as to whether he should still be on the force (see AC at ¶17.D.).

a. Robert Barboza has a substance abuse problem requiring a treatment program or has one of the three worst substance abuse problems on the force or drinks alcohol straight from the bottle

Mr. Barboza contends that these defamatory implications arise from the June 30, 1990 article about him. In particular, he argues that such implications arise because one of the key findings for that day states that, "[w]hile dozens of officers have been caught abusing drugs or alcohol the last two decades, Internal Affairs records show only four have been ordered into treatment programs." See The Blade, June 30, 1990, at 1. He also asserts that the June 30th headings suggest he has a drinking or substance abuse problem. See *Id.* at 1, 6. Barboza further reasons that, by choosing his

picture as one of three photographs to appear under the front page heading "Drink, drugs: a problem in blue" and under the aforementioned "Key findings of day seven," The Blade implies that he has one of the three worst substance abuse problems on the force and that he should be in treatment for that problem. See *Id.* at 1. As a final element of this claim, Barboza contends that the illustration of a police officer's silhouette drinking directly from a liquor bottle defamatorily implies that he drinks liquor directly from the bottle.

The Court will first address the alleged defamatory implication that Mr. Barboza guzzles liquor directly from the bottle. Reading the entire June 30th article, which mentions many Toledo police officers and their bouts with alcohol and/or drugs, and looking at the illustration in the context of this article, the illustration cannot reasonably be construed to imply that Barboza swigs alcohol right out of the bottle. The illustration does not refer to or identify Mr. Barboza in any way. In addition, it contains no caption stating that it represents Barboza. Because, when viewed in its context, the illustration conveys no defamatory implication "of and concerning" Barboza, it cannot support his defamation claim. See *New York Times, supra*, at 288; R.C. 2739.01.

The Court will next address the alleged defamatory implications that Barboza has a substance abuse problem that requires treatment or that he has one of the three worst substance abuse problems on the

force. Preliminarily, the Court notes that Mr. Barboza does not deny the truth of any of the facts printed about him, which purportedly provide the basis for this defamatory implication. It is well-settled that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." See *Garrison, supra*, 74. Undeniably, the on- duty use of alcohol by a Toledo police officer is a public affair, and a most disturbing one. Since Mr. Barboza does not deny the truth of the facts printed about his pool party incident, he cannot, as a matter of law base his claim on The Blade's printing of those facts. *Id.*

Although Mr. Barboza does not dispute the truth of the facts printed about him, he argues that false and defamatory implications do arise from The Blade's printing of those facts in articles about substance abuse. He also contends that the false implications alleged stem from the omission of other relevant facts. Namely, Barboza points out that The Blade omits the fact that the pool party incident described was only one isolated occurrence in the years he served on the Toledo police force up until the IA series was printed. He argues that that omission, coupled with The Blade's placement of his story and photograph in an article about substance abuse suggests he has a substance abuse problem.

Even if the defamatory implications alleged could arise from the items highlighted by Mr. Barboza, The Blade argues and the Court finds that the challenged

publication is, nevertheless, protected under the innocent construction rule because it is capable of conveying a truthful and innocent meaning. See *Yeager, supra*, at 372. Contrary to Mr. Barboza's assertion, the article he cites as the basis of this claim is not only about substance abuse, but also about substance abuse *offenses*, i.e., cases in which officers were using alcohol or drugs while on duty. Rather than conveying the implication that Mr. Barboza is a substance abuser, the plain language of the article conveys that Barboza's case was merely one of three cases highlighted, and not necessarily one of the three worst cases that The Blade reporters encountered in their research. The June 30th article even states, with respect to the three cases mentioned and officers pictured, that their cases were not isolated ones. See, The Blade, June 30, 1990, at 1. The article then goes on to discuss numerous other instances in which Toledo police officers used drugs and/or alcohol while on duty. Moreover, the June 30th key finding that "[w]hile dozens of officers have been caught abusing drugs or alcohol the last two decades, Internal Affairs records show only four have been ordered into treatment programs, can be innocently construed as conveying a statistical finding, rather than defamatorily conveying the implication that Barboza, as one of the officers pictured, has such a bad substance abuse problem that he should have been placed in treatment. It is this Court's conclusion that the information Barboza highlights simply does not convey the defamatory meaning asserted. Barboza's interpretation is a strained and crabbed alternative reading at best. This becomes especially clear when the

interpretation is compared to the plain-language report as to the pool party incident. See, generally, *Yeager, supra*, at 372. See, also, *Mendise* and *Sheppard, supra*. As a consequence, this claim fails under the innocent construction rule. *Id.*

b. Robert Barboza has some association with the devil or beast

Mr. Barboza argues that this defamatory implication stems from information printed on June 30th and July 1, 1990. Namely, he contends that the implication arises because The Blade purposely printed his former badge number, 666, to suggest that he had some sort of association with the devil. See The Blade, June 30, 1990, at 6. Barboza argues that The Blade's defamatory intent was obvious because he no longer had that badge number at the time the IA series was printed and because his badge number was the only one printed in the entire series.[17] In addition, he points to deposition testimony in which Roe, who inserted the badge number, and Murray, who wrote the rest of the arcticle, admit that they were aware that some people believe the number is associated with the devil. See Roe Dep. at 148- 50; Murray Dep. at 287-88. In addition, Barboza argues that his implied association with the

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17 Although Mr. Barboza states that he neither wore nor had badge no. 666 at the time the IA series was published, he does not deny that he wore that number or, as the Blade claims, that he wore that number at about the time the pool party incident occurred. In this regard, Mr. Barboza has failed to provide any evidence that the Blade falsely printed a badge number of his.

devil is further bolstered in The Blade's July 1st article entitled, "Are we hiring the best?" See The Blade, July 1, 1990, at 1. In this article, which refers to Mr. Barboza and other officers, an unidentified Toledo police command officer is quoted as saying, "'The kind of people we are recruiting is appalling * * *. You look at some of them and say, "How in the devil did they get here?"'" *Id.* at 6.

In support of its motion for summary judgment on this claim, The Blade argues that this alleged defamatory implication is not actionable for two reasons. First, The Blade argues that the implication that Barboza is associated with the devil or beast is tortured and extreme and, thus, not actionable. The Court agrees. To determine whether this publication is defamatory, this Court must inquire whether, viewing the publication in its entirety, a person reading the materials could reasonably conclude that The Blade inferred that Barboza had an association with the devil. See generally, *Matalka, supra*, at 136. In making this inquiry and reading all the materials printed on June 30th and July lst, the Court finds that no reasonable reader could possibly believe that Barboza actually had an association with the devil.[18] At most, a reader could

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18 It is noted that plaintiffs', in order to establish the defamatory meaning of the words cited by Barboza, proffered the opinions of their expert "psycholinguist" Saha. On February 23, 1993, the Court granted defendant's motion to strike the testimony, reports and affidavit of Professor Saha, in part because "the Court is not in need of his views as to whether or how various reports might be susceptible of a defamatory construction * * *.11 (Transcript of 2/23/93, pp. 2-3.) Moreover, it was the

conclude that the use of Barboza's old badge number amounted to no more than the reporter's juvenile attempt at humor by the employment of a rhetorical hyperbole, which is protected as a matter of law. See Milkovich, supra, at 2706; Matalka at 136-37. As the Matalka court noted in a similar situation:

> "Although it may be regrettable that defendants became emotionally involved in a local issue to the extent that they were moved to print patent absurdities, the law of defamation is not designed or permitted to penalize those who merely speak foolishly and without moderation. The framers of the United States Constitution well understood that, if a free press were to be guaranteed, the expression of silly or even sinister

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Court's determination that Professor Saha would not qualify as an expert under Evid. R. 702, "because he is not involved in a recognized area of specific discipline [and] because he was not provided by plaintiffs' counsel * * * with anything approaching a fair cross-section [sic] of the record on which this case has been built." Id. In addition, upon consideration of Mr. Saha's analyses, this Court found "the vast bulk" of them to be either "strained, attenuate, tortured or balderdash." *Id.* At p.3.

Professor Saha's purported discipline psycholinguistics - has no national or international academy or governing board. There are few practitioners (Saha estimated a dozen or so worldwide), and there is little, if any, communication among these stalwart souls. In this context, psycholinguistics does not rise to a "field" or "discipline." Given the preposterous nature of Saha's assertions in this case, psycholinguistics barely rises to

> -sounding views would have to be tolerated. This risk they accepted, trusting in the good sense of people to weed out, upon deliberate reflection, the foolish from the factual." *Matalka* at 137 (involving non-actionable depiction in a cartoon, of city council as a prostitute).

This Court, like the *Matalka* court, trusts in the public's good sense to separate foolish insinuation from fact and, thus, finds the alleged defamatory implication here nonactionable.

The Court also finds that the alleged implication that Barboza has an association with the devil is protected under the innocent construction rule. The words from which this implication allegedly arises are susceptible to two meanings, one, albeit absurd, defamatory meaning, i.e., that Barboza is actually associated with the devil; and one innocent meaning, i.e., that 666 was Barboza's badge number and that the unidentified command officer was perplexed at how some officers were recruited. See The Blade, June 30, 1990, at1, 6 and July 1, 1990, at 1, 6. Under the innocent construction rule, this Court adopts the innocent meaning of the words cited by Barboza and rejects the allegedly defamatory meaning of those words. In so doing, the Court finds that Mr. Barbozals claim fails under the innocent construction rule. See *Yeager* at 372, *Mendise* at 726, and *Sheppard, supra*.

C. Robert Barboza has such an extensive drinking problem that he shouldn't have been hired as a police officer

Once again, Mr. Barboza does not claim that The Blade explicitly states that he should not have been hired as a police officer because he has an excessive drinking problem; however, Barboza does argue that this allegedly false and defamatory implication arises from the information printed about him. This claim focuses on The Blade's July 1 article entitled, "Are we hiring the best?" See The Blade, July 1, 1990, at 1, 6. In particular, Barboza objects to the following account of his pre-hiring and employment history:

> "Robert Barboza was hired in 1979 even though a background investigation found he had been arrested three times for drunk and disorderly conduct and once for resisting arrest.
>
> "Five years after joining the force, he was relieved of duty after his partner complained that, while on duty, he had stopped at a police pool party to drink beer, had driven recklessly, and was drunk. Still on the force, he was suspended for 20 days." *Id.*

Mr. Barboza does not deny the literal truth of these facts but he does find it troubling that The Blade fails to mention that his disorderly conduct arrests occurred

when he was eighteen years old, prior to his building an exemplary military record and employment history, which Roe and Murray were aware of when they wrote the article in dispute. In addition, Barboza finds it objectionable that The Blade omits the fact that the pool party incident was the only incident of misconduct he was charged with from the time he was hired until the article was printed. Mr. Barboza argues that the omission of these facts creates the defamatory implication that he should not have been hired because he has a drinking problem. He maintains that this implication is further emphasized by the aforementioned passage's inclusion under the following headline, "Troubled backgrounds don't always disqualify candidates." See *Id.*

In support of its motion for summary judgment, The Blade points out that it never stated that Barboza had a drinking problem or that he should not be on the police force. Instead, The Blade argues that it merely "noted a correlation between the behavior revealed by a pre-hiring background investigation and behavior that led to Officer Barboza's subsequent suspension from the police force." Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment at 66. As a preliminary matter, the Court reiterates that Mr. Barboza neither denies that he was arrested three times for drunk and disorderly conduct prior to his being hired by the Toledo police, nor denies that he incurred a twenty-day suspension for the pool party incident. In fact, he admits that "[i]n 1969, at the age of 18 years, [he] had three separate convictions for drunk

and disorderly, and one for resisting arrest." See Appendix, Barboza, Barboza Aff. at ¶7.

As the Ohio Supreme Court noted, the press is entitled to draw even unfavorable inferences from truthful facts without losing First Amendment protection. See *Perez, supra*, at 219. The Perez court further propounded that, "[i]n any broadcast, there will be a selection made as to what is newsworthy. The relevant question is whether that selection is made with a view toward the dissemination of false information." *Id.* at 220. Using the same logic as that used in *Perez*, this Court finds that The Blade's omission of the dates of Barboza's arrests and the fact that the pool party incident was only an isolated occurrence does not demonstrate a disregard for the truth or alter the truth of the story about Barboza. This is especially true since, according to the Toledo Police Division's 1990 Police officer Background Investigation Rating Scale, Barboza could have been rejected from employment due to his drunk and disorderly and resisting arrest convictions. See Ex. 2, ¶16, App. B at categories 42, 44, 76. Consequently, the story, as it relates to Barboza, does not lose its First Amendment protection. See *Perez, supra*, at 220-21.

Similarly, if The Blade, by printing the facts it printed about Mr. Barboza, implied that he should not be on the police force, that implication is a protected statement of opinion. Under *Milkovich*, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation"

receives full constitutional protection. *Milkovich, supra*, at 2707. Whether or not Mr. Barboza *should have* been hired as a Toledo police officer is subjective matter of opinion which cannot be proved true or false. As such, that implication is constitutionally protected. *Milkovich, supra*, at 2707.

d. Robert Barboza has no example of extraordinary performance an there is a question as to whether he should still be on the force

Essentially, Mr. Barboza's fourth and final claim, that The Blade implies he has no examples of extraordinary performance and there is a question as to whether he should still be on the force, is based upon the same material upon which Mr. Case's and Mr. Taylor's parallel claims were based. See AC at ¶¶17.D., 37.C., and 42.C. Like Case and Taylor, Barboza points to examples of extraordinary performance in his files to demonstrate the fallacy of this alleged defamatory implication. See Appendix, Barboza, at 005264-71, 005273-75. Also like Case and Taylor, Barboza turns the Court's attention to a few passages in the series that purportedly convey the defamatory implication he alleges. See AC ¶¶17.D.1., 37.C.1., 42.C.1. Mr. Barboza, however, further amplifies his claim by pointing to a few more sentences in the IA series that purportedly convey the defamatory implication alleged. Specifically, he turns the Court's attention to the Nichols article in which Roe explains, that after viewing a particularly disturbing file, "we [Roe and Murray] decided we had to

go through the Internal Affairs files from A to Z." See The Blade, June 24, 1990, section E, at 5. Barboza argues that this sentence, along with Murray's statement that he and Roe "went through all the police personnel files looking for examples of extraordinary performance', suggest that Barboza had no such examples in his file or The Blade would have printed them. Barboza, like Case and Taylor, claims that this defamatory implication arises because The Blade printed examples of extraordinary performance from one officer's file but printed no such favorable information about him despite the fact that each of their files contained examples of extraordinary performance.

Also in support of his claim, Barboza turns the Court's attention to another sentence in the Nichols article in which Nichols states "But if past experience is any evidence, the vast majority of readers will make up their minds on the basis of the information placed before them." See The Blade, June 24, 1990, section E, at 5. Barboza argues that, although the series was touted as being "more than fair," the aforementioned omissions prevent members of the community from fairly making up their minds.

Despite Barboza's addition of a few more sentences to support the defamatory implication he alleges, the Court finds that The Blade is entitled to summary judgment on this claim for the same reasons it was entitled to summary judgment on Case's and Taylor's parallel claims. See *ante* at 73-76, 87. Even the

additional sentences that Barboza points to do not change the Court's finding. The Blade's statements that the IA series is fair and/or that individuals will make up their own minds based on the information printed are simply not defamatory, nor do they add to the defamatory implications alleged even when those sentences are viewed in the context of the entire series. And, at the risk of undue repetition, it is stressed that the statements in the "Nichols piece" were not "of and concerning" Barboza.

In addition, Murray testifies that, in writing his contributions to the IA series, he did not intend to imply that Mr. Barboza had no examples of extraordinary performance in his files or that he should not still be on the police force. See Ex. 2, ¶¶17-19. Mr. Barboza's failure to provide contrary evidence of defamatory intent entitles The Blade to summary judgment on this claim. See *Saenz, supra*, at 1318.

6. Michael Early

Michael Early's three defamation claims are based on The Blade is printing of an account of an incident in which Early accidentally shot a citizen in the chest while intervening in a traffic dispute. On June 29, 1990, The Blade published an article entitled, "Since 1985, a third of police gunfire ruled accidental." See The Blade, June 29, 1990, at 6. In the article, The Blade described how Mr. Early walked in front of a car driven by David Stalma and was bumped by that vehicle. When Early attempted to reach in the car window and turn off

the ignition, the automobile drove off with Early hanging on. Then, with Early dangling from the car with his gun drawn, a struggle ensued and David Stalma was shot in the chest. The Blade also reported that the firearms review board ruled this shooting accidental and ordered Early to receive additional weapons training. *Id.*

Mr. Early does not deny the substantial truth of the facts reported. See Appendix, Early, Early Aff. at ¶3; Plaintiff's Responses to Defendant's First Set of Interrogatories and Requests to Produce to Plaintiff Michael Dennis Early at Nos. 14, 15. Instead, he claims that various defamatory implications arise via The Blade's inclusion of those facts in a series about misconduct and in a day's worth of articles devoted entirely to officers' using their guns while drinking alcohol. Specifically, Mr. Early argues that the following allegedly defamatory implications arise: (1) Officer Michael Early was involved in misconduct of some kind (see AC at ¶27.A.); (2) Officer Early had been drinking alcohol at the time of the incident (see AC at ¶27.B.); (3) Officer Early was contacted for his side of the story (see AC at ¶27.C.).

Mr. Early's assertions, however, do not provide an accurate portrayal of the day six thrust. In fact, a dispassionate reading of the story about accidental shootings (and, for that matter, the two cases discussed under the heading, "Other key gun cases") are about incidents having nothing to do with alcohol.

a. Officer Early was involved in misconduct of some kind

In support of his claim that this allegedly defamatory implication arises, Mr. Early points to the following items, which, he contends, suggest that he was involved in some sort of misconduct in connection with the Stalma shooting. First, Early turns the Courts attention to the June 24th headline preceding the Nichols article, "'Secret Files' became 7-month exploration of police misconduct." See The Blade, June 24, 1990, at 5. Next, Mr. Early highlights a quote in which Roe states, "We [Roe and Murray) went out and interviewed victims of police misconduct." Last, Early points to a television advertisement for the IA series in which a person declares, "It is inconceivable that this kind of Toledo police misconduct has been hidden from view for seventeen years-" All of these items, Early contends, suggest that the IA series was entirely about police misconduct. He further argues that, since a story about him was included in the series, the implication arises that he was guilty of misconduct. Mr. Early argues that this implication is false since his shooting was ruled accidental. In addition, Early maintains that The Blade perpetuated the falsity by failing to distinguish Early from other officers who were guilty of misconduct and by failing to create the expectation in the minds of readers that some stories would not be about misconduct.

In support of its motion for summary judgment on this claim The Blade raises four cogent arguments.

First, The Blade argues, and the Court agrees, that the items noted in no way identify or refer to Early; therefore, since those statements were not made "of and concerning" Early, they cannot support his defamation claim. See *New York Times* at 288 and R.C. 2739.01, supra.

Second, The Blade asserts that this claim must fail under the innocent construction rule. The article referring to Early nowhere states that he is guilty of misconduct. In f act, it explicitly states that "[t]he firearms review board ruled the shooting accidental." See The Blade, June 29, 1990, at 6. Reading the article discussing the Stalma shooting and the statements highlighted in the context of the entire series, one can certainly reach the innocent conclusion that those statements were nothing more than isolated references to certain aspects of the series and its creation, having no particular applicability to any specific individual written about in the series. Since the items highlighted are capable of supporting an innocent meaning, the Court is constrained to adopt the innocent meaning. See *Yeager* at 372, *Mendise* at 726, and *Sheppard, supra*. As a result, Mr. Early's claim fails under the innocent construction rule.

As a third argument in favor of summary judgment, The Blade avers that its account of the Stalma shooting is protected under the fair report privilege. In support of this argument, Roe testifies that, in writing the story about Early, he referred to various documents supplied by the Toledo Police

Division through a public records request. See Ex. 3, Roe Aff. ("Ex. 3"), 13, App. B. In addition, Roe states that his story about Mr. Early was based on Early's own statements regarding the incident. See Ex. 3, ¶14, Apps. B and C at 005497-501, 005634-35. In examining these statements and comparing them to The Blade's account of the Stalma shooting, the Court finds that The Blade's report is substantially accurate, conveying to the ordinary reader the essence of the documents relied upon. See *Oney, supra*. It is, thus, protected under the fair report privilege as set forth at R.C. 2317.04. See R.C. 2317.04; *Oney*, *supra*, at 106.

The Blade, in its fourth and final argument, argues that it is entitled to summary judgment because Mr. Early has failed to provide evidence in support of the essential element of falsity. In support of this argument, The Blade points out that Early admits to accidentally shooting Stalma in the chest. See Appendix, Early, Early Aff. at ¶3. Consequently, The Blade reasons that, to the extent that an accidental shooting constitutes misconduct, Mr. Early has failed to show that the defamatory implication he alleges is false. Merriam Webster's Collegiate Dictionary (10 Ed. 1993), 743 defines "misconduct" as "1: mismanagement esp. of governmental or military responsibilities * * *. 3.a: improper behavior."

Since an accidental shooting can amount to mismanagement of the responsibility to safely operate a firearm, the Court agrees with The Blade's analysis and finds that Mr. Early has failed to provide evidence

of falsity, an essential element of his defamation claim. See *Philadelphia Newspapers, Inc. v. Hepps* (1986), 475 U.S. 767,776 (Under the First Amendment, a public official plaintiff must prove falsity in a libel action.) As a result, his claim must fail. *Id.; Wing, supra.*

b. **Officer Early had been -drinking at the time of the accident**

With respect to this claim, Mr. Early points to about six headlines, advertisements, and sentences appearing on six different days, which, he argues, suggest that Mr. Early was drinking alcohol when he accidentally shot Mr. Stalma. The Court will discuss each of these items in their proper context, rather than in isolation.

Mr. Early first asks the Court to examine the Nichols article in which Roe states, "We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns * * *. 11 See The Blade, June 24, 1990, section E, at 5. That sentence, the Court notes, appears directly after Murray explains, "After looking through 1,000 internal affairs files, we pared that down to about 200 we wanted to look more closely at." *Id.*

Second, Mr. Early turns the Courts attention to the following advertisement appearing in the June 28th Blade:

"Tomorrow: Internal Affairs files and

> other records reveal numerous instances in which officers have used their guns not to protect the public good, but to undermine it.
>
> "And, although the cases vary, there is a startling common denominator: the officers are invariably off-duty and drinking alcohol.
>
> "While drinking, off-duty officers have used their guns to kill and injure innocent people, put bystanders at risk, and threaten people in their personal lives." See The Blade, June 28, 1990, at 6.

Third, Mr. Early highlights some headlines from the June 29th Blade. One headline and its accompanying subheading read: "Armed and dangerous" and "When firearms and alcohol combine, the result may prove deadly," respectively. See The Blade, June 29, 1990, at 1. The continuation to the front page article appears on page six of The Blade and is preceded by the headline, "Guns, alcohol:' a deadly mix." These headlines, and the binder heading, "Armed And Loaded," were printed on the same day as the article discussing Mr. Early's accidental shooting of Mr. Stalma. The report about Mr. Early's firearm mishap, however, appears in a clearly separate article entitled "Since 1985, a third of police gunfire ruled accidental." See *id.*

Fourth, Mr. Early turns the Court's attention to a passage appearing on day seven of the IA series, the day after the article referring to Early was printed. That caption gives a brief description of series coverage for the preceding and following days. With respect to day six, it states, "Yesterday: Drinking by armed off-duty officers - a violation of state law - has resulted in one killing and has threatened the lives of dozens of citizens." See The Blade, June 30, 1990, at 6.

The fifth item Mr. Early points to in support of his claim is a series overview printed in the July 1st Blade. With respect to day six, the day the reference to Early was made, the following overview appears:

> "Friday
> "Armed and Loaded
> "Records reveal numerous instances in which officers have used their guns not to protect the public good but to undermine it. While drinking, armed officers have killed and injured innocent citizens and have threatened people in their personal lives. See The Blade, July 1, 1990, section A, at 6.

Last, Mr. Early asks the Court to look at an editorial referring to the IA series wherein it is stated, "As the stories of day six related, there is no shortage of examples in the Internal Affairs files of what can happen when officers are both armed and loaded." See The Blade, July 9, 1990, at 6.

From these items, Mr. Early argues that readers are told that all the articles on day six, June 29, 1990, are about officers abusing their firearms while drinking alcohol. He contends that The Blade's constant bombardment of readers with this theme leaves room only for them to conclude that Early was drinking alcohol when he accidentally shot Stalma. The Court disagrees with this analysis.

In support of its motion for summary judgment on this claim, The Blade argues that, even if aforementioned passages in the IA series conveyed the defamatory meaning alleged, the Series is, nevertheless, susceptible to an innocent construction with regard to Mr. Early. The Court agrees. Although reading the highlighted passages in isolation could, perhaps, suggest that all of the stories for day six involve officers' using firearms and alcohol in combination, a more reasonable and innocent construction arises through a reading of the entire series, including a reading of the article referring to Early in its proper context. As The Blade points out, the article referring to Mr. Early's mishap is clearly preceded by a distinct headline, "Since 1985, a third of police gunfire ruled accidental." See The Blade, June 29, 1990, at 6. That article discusses how shootings are evaluated by the firearms review board and are declared justified, unjustified, or accidental. It also explains that the number of shootings ruled accidental had been on the rise since the 19701s. The article then goes on to discuss three incidents in which gunshots were ruled accidental, and one incident in which the gunfire was ruled unjustified. *Id.* The Blade

plainly states that Mr. Early's shooting of Mr. Stalma was ruled accidental. More importantly, the word alcohol is never mentioned in this article. Although, The Blade never specifically states that Mr. Early was not using alcohol when he shot Mr. Stalma, a reasonable reader can easily reach the innocent conclusion that Early was sober at the time of the incident.

To further illustrate the ease with which this innocent conclusion arises, the Court presents the following example. If a reader were to conclude, based on the information cited by Mr. Early, that Mr. Early shot Mr. Stalma while intoxicated, then the reader would presumably have to conclude that one of the other officers mentioned in this article discharged her firearm while she was drinking alcohol. This other officer is Joyce Hayes, who accidentally shot another officer, Kevin Wendt, in the abdomen during a roll-call firearms check. If a reader is to conclude that Ms. Hayes shot Mr. Wendt while she was drinking alcohol, then the reader would have to conclude that she reported to work having consumed alcohol. This conclusion is unreasonable since there is absolutely no suggestion to that effect in the article. See *Id.* Similarly, from the information printed, it is unreasonable to conclude that Mr. Early was drinking alcohol when he shot Mr. Stalma.

Presuming that the defamatory implication alleged could arise from the IA series, the series is, at least, equally capable of conveying an innocent

implication. Despite the passages highlighted, a plain reading of the article mentioning Mr. Early gives rise to the innocent construction that he shot Mr. Stalma while sober. As a consequence, this claim fails under the innocent construction rule. See *Yeager*, at 372, *Mendise* at 726, and *Sheppard, supra.*

C. Officer Early was contacted for his side of the story

In support of his third and final claim, Mr. Early points to the following sentence from the Nichols article. Elaborating on quotes by Murray and Roe who indicated that they pared down somewhat the volumes of material they began looking at, Nichols explained, "Once they had done this, the pair set out to recreate key incidents, talking with persons associated with those cases: *the officers*, their commanders, victims, and bystanders." (Emphasis added.) See The Blade, June 24, 1990, section E, at ¶5. Mr. Early argues that this one sentence falsely implies that Mr. Early would be contacted for his side of the story. The falsity arises, he contends, because The Blade admits to never having contacted Early for his side of the story.

In support of its motion for summary judgment, The Blade argues, and this Court agrees, that even if this statement could be construed to imply that Mr. Early would be contacted for his side of the story, the implication is non-defamatory and, thus, non-actionable. "A defamatory statement is one which tends to cause injury to a person's reputation or exposes him

to public hatred, contempt, ridicule, shame or disgrace or affects him adversely in his trade or business." *McCartney* at 353 and *Natl. Medic Serv. Corp.* at 755, *supra*. The statement highlighted and implication alleged are simply not defamatory. Without evidence in support of an essential element of his claim, i.e., the element of defamation, Mr. Early's third claim must fail. See *Wing, supra.*

7. John P. Smith

Essentially, Mr. Smith's defamation claims are centered upon The Blade's June 25, 1990 article entitled "Police violence: a costly, recurring problem for city." See The Blade, June 25, 1990, at 1, 6. The article begins on the front page of the June 25th Blade and continues onto page 6, where the continuation is preceded by a similar headline, "A costly, recurring, and painful problem". *Id.* at 6. The portion of the article mentioning Mr. Smith is introduced by a subheading, "City attorneys on defense." *Id.* Following this subheading, the article explains:

> "Even though [another officer] cost Toledo taxpayers $29,000 in out-of-court settlements, city lawyers have spent far more time with the problems of another policeman - Sgt. J.P. Smith.
>
> "He has had the city attorneys in court defending against two lawsuits - one of them active for eight years." *Id.*

Next, the article describes the two lawsuits filed against Mr. Smith. It also explains that although Mr. Smith was contacted for his comment on the two lawsuits, he declined to make a statement because the two lawsuits were pending in court.

With respect to the first lawsuit, The Blade reported that Ms. Mary Ann Henneman, in her pending suit, sought $100,000 in damages and alleged that Mr. Smith "beat" her. *Id.* In discussing this lawsuit, The Blade printed not only Ms. Henneman's allegations but also Mr. Smith's explanation of this incident as he recorded it in his own report. *Id.* The Blade also plainly reported the following Internal Affairs finding, which was conveyed to Ms. Henneman in a letter from then-Internal Affairs lieutenant Marti Felker: "Careful examination and evaluation of the available evidence failed to establish that the alleged acts took place." *Id.*

The article then proceeded to discuss a second lawsuit filed against Mr. Smith by the parents of an arrestee. According to The Blade's report, Mr. Smith had an altercation with these two individuals and ultimately arrested one of them for obstructing official business in connection with the arrest of their son. *Id.* The report also noted that,

> "In his arrest report, Sergeant Smith said Kenneth, Sr., tried to interfere with officers wrestling with his son.
>
> "That was a lie", Internal Affairs ruled.

> "'At the time of Kenneth Roberts, Sr., and LeWanna Roberts' arrival at 4349 Vogel Drive, Kenneth Roberts, Jr., was down on the floor handcuffed,' an Internal Affairs investigator wrote in a report to then-Police Chief John Mason. 'All resistance on the part of Kenneth Roberts, Jr., had ceased." *Id.*

The report about this lawsuit concluded by noting that Mr. Smith initially received a thirty-three-day suspension and a demotion as a result of this incident, but that penalty was reduced by the civil service commission to just a four-day suspension. *Id.*

Like many of the other plaintiffs in this lawsuit, Mr. Smith does not deny that The Blade accurately reported the allegations in the suits filed against him. Smith admits that The Blade accurately recounted Ms. Henneman's allegations against him. See Smith Dep. at 149. He does, however, object to The Blade's printing of these allegations without printing that juries had twice, once in 1985 and once approximately a month before the reprint of this series was distributed, found that Ms. Henneman failed to meet her burden of proving those allegations.[19] Smith voices this objection while acknowledging that the first jury verdict was reversed to allow Ms. Henneman an opportunity for further discovery. See Ex. 2, ¶45, App. K; Ex. 14. *Henneman v.*

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19 Later in this opinion, the Court will address the ramifications of The Blade's failure to note the second jury verdict in the reprint.

City of Toledo (Dec. 24, 1986), Lucas App. No. 86-206, unreported, affirmed (1988), 35 Ohio St.3d 241. In addition, with respect to the second lawsuit discussed in the article, Smith does not even mention, let alone deny, the facts The Blade reported with regard to the Roberts incident. Instead, he argues that defamatory implications arise from The Blade's printing of these facts in conjunction with isolated sentences sprinkled throughout the IA series and from The Blade's failure to print a list of commendations received by him. Based on these actions on the part of The Blade, Mr. Smith argues that the following defamatory implications arise: (1) that J.P. Smith used excessive force in the arrest of Mrs. Henneman (see AC at ¶32.A.); (2) that J.P. Smith used excessive forced against citizens more than once (see AC at ¶32.B.); (3) that J.P. Smith doesn't have examples of extraordinary performance in his personnel file (see AC at ¶32.C.).

a. That J. P. Smith-used excessive force in the arrest of Mrs, Henneman and the article is fair

In support of his first claim, Mr. Smith turns the Court's attention to the following items, claiming that they defamatorily imply that he used excessive force in the arrest of Mrs. Henneman. To begin, Mr. Smith highlights the heading of the article discussing him,"Police violence: a costly, recurring problem for city." See The Blade, June 25, 1990, at 1. Apparently, this headline implies that Mr. Smith used excessive force to arrest Ms. Henneman because, on the same day

the headline appears, The Blade uses the words "police violence" interchangeably with the words "excessive force." Mr. Smith contends that this implication arises because a topical overview printed on the same day as the aforementioned headline states, "TODAY: Police excessive force is a costly, recurring, and painful problem." *Id.* at 6.

As additional support for his claim that The Blade implied he used excessive force to arrest Ms. Henneman, Mr. Smith points to The Blade's reiteration of allegations against him, which were gleaned from Henneman's complaint in *Henneman v. City of Toledo. et al.*, Lucas County C.P. No. 82-1699. Specifically, Smith objects to The Blade's report that "Ms. Henneman claims in her suit that Officer Smith dragged her from the house and down the front porch onto the icy yard, where he 'used violent and excessive force on the plaintiff, including blows to the head, arms, legs, and body with a night stick.'" See The Blade, June 25, 1990, at 6. Mr. Smith lodges this objection despite his having acknowledged that the report was an accurate reproduction of the allegations in Ms. Henneman's complaint against him. See Smith Dep. at 149. Indeed, a comparison of The Blade's report and Ms. Henneman's complaint in her suit against Smith and the City yields the same conclusion. See The Blade, June 25, 1990, at 6; Ex. 2, App. M., Complaint at 005873-74. Although Mr. Smith concedes that Ms. Henneman's allegations were accurately reproduced, he argues that the allegations themselves are false and defamatory because they lead to the implication that he

actually used excessive force in the arrest of Ms. Henneman.

The Blade, on the other hand, maintains that the defamatory implication alleged simply does not arise through a reading of the headlines and accompanying text; therefore, The Blade argues, it is entitled to summary judgment on this claim as a matter of law. As mentioned before in this opinion, "[i]t is a question of law for the court whether certain statements alleged to be defamatory are actionable." *Mendise, supra*, at 726, citing *Yeager, supra*, at 372. In determining whether a reader would interpret certain statements as defamatory, courts must examine the statements under the totality,of the circumstances and read them in the context of the entire article. *Id.* Courts must also apply the innocent construction rule to ascertain whether an article could reasonably be interpreted to defame someone. *Id.* Applying this rule to statements capable of two meanings, one innocent and one defamatory, a court must adopt the innocent one and reject the defamatory one. *Yeager* at 372.

Applying these rules to the facts of this case the Court finds that, examining the totality of the circumstances and reading the alleged defamatory statements in the context of the entire series, the defamatory implication alleged simply does not arise. In fact, the Court finds the facts of this case remarkably similar to the facts in the Mendise case. In Mendise, the headline in question announced, "Criminals Contribute to Laborer's Political Funds." The article following the

headline proceeded to list several contributors and their respective criminal backgrounds. It also mentioned certain criminal charges against Mendise and his subsequent acquittals on those charges. Mendise sued, claiming that the article implied he was a criminal contributor. Applying the rules just mentioned, the court found Mendise's claim unwarranted and concluded that no reasonable reader could believe that Mendise was a criminal because the article specifically stated that was acquitted of the criminal charges mentioned. See *Mendise*.

Similar to the *Mendise* case, in this case, The Blade printed Ms. Henneman's accusations against Mr. Smith. It also truthfully noted that those charges were still pending. Moreover, The Blade printed Smith's version of the Henneman incident, namely, that his striking Ms. Henneman in the head with his nightstick was an accident. The Blade also asked Smith for further comment and noted that Smith declined to comment because the lawsuit was pending. In addition, The Blade reported that Internal Affairs found that "[c]areful examination and evaluation of the available evidence failed to establish that the alleged acts took place." See The Blade, June 25, 1990, at 6. Under the totality of the circumstances and reading the headlines, allegedly defamatory statements and the article in its entirety, the Court concludes that no reasonable reader could conclude with any certainty that Mr. Smith used excessive force to arrest Ms. Henneman. See *Mendise* at 726.

In any event, even if that defamatory implication could arise, the Court finds that the innocent construction rule precludes adoption of that implication. Under this rule, the Court must adopt the truthful and innocent construction arising from the article and its accompanying headlines: Ms. Henneman *accused* Mr. Smith of using excessive force against her, but Internal Affairs cleared him of those charges and Ms. Henneman's lawsuit over the same charges is still pending. See *Yeager* at 327, *Mendise* at 726, and *Sheppard, supra*.

Also in support of its motion for summary judgment on this claim, The Blade argues and the Court agrees that The Blade's reiteration of the allegations in Ms. Henneman's complaint, to the extent that it conveys the defamatory implication alleged, is protected by the fair report privilege. As noted previously, Mr. Smith even admits that The Blade's report of Ms. Henneman's allegations is accurate. See Smith Dep. at 149. Moreover, a comparison of the complaint from *Henneman v. The City of Toledo, et al.*, Lucas C.P. No. 82-1699 and The Blade's account of those allegations is a substantially accurate report of that filed court document. See R.C. 2317.05; Ex. 2, App. M, at 115872-76; The Blade, June 25, 1990, at 6. See also, *Oney, supra*, at 106. As a consequence, the report is protected under the fair report privilege as set forth at R.C. 2317.05. See *Oney* at 106.

As additional support for its motion for summary judgment on this claim, The Blade argues that, to the

extent that it implied Smith used excessive force to arrest Henneman, Smith has failed to provide sufficient evidence of actual malice to avoid summary judgment. Mr. Smith, on the other hand, maintains that he did provide evidence directly supporting a showing of actual malice. In particular, Smith argues that The Blade conveyed the implication that Smith used excessive force against Henneman while knowing that a jury twice found that Ms. Henneman failed to meet her burden of proving those charges. It is undiluted that The Blade made no mention of the first jury verdict in its June 25, 1990 article discussing the Henneman incident. The second verdict, however, had not been reached at the time that article was printed, so The Blade could not have expounded on it at that juncture.[20] More importantly, it is undisputed that the first jury verdict was reversed in part and remanded by the Sixth District Court of Appeals, whose decision was affirmed by the Ohio Supreme Court at the time the IA series was printed for the first time. See *Henneman v. City of Toledo, et al.* (Dec. 24, 1986), Lucas App. No. 86-026, unreported, affirmed (1988) 35 Ohio St.3d 241; Ex. 2, ¶45, App. K; Ex. 14. The Blade even noted that Henneman's action against Smith was pending in court. See The Blade, June 25, 1990, at 6. Murray, via affidavit, justifies his omission of the first jury verdict, explaining,

"At the time I wrote the portion of the

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20 The Court will address the issue of actual malice in connection with the reprint later in this opinion.

> June 25, 1990 edition of The Blade referring to J.P. Smith I was aware that the Court of Appeals had reversed the original trial court verdict in Mary Ann Henneman's suit against the City of Toledo and J.P. Smith based on a finding that Ms. Henneman had been wrongly prevented from obtaining evidence necessary to properly prepare her case and prove her claims. I also was aware that the Ohio Supreme Court had affirmed the decision of the Court of Appeals and that the case had been sent back to the trial court. I therefore considered the verdict in the trial court a nullity. * * *." Ex. 2, ¶45.

Based on the totality of the circumstances and the evidence presented, the Court concludes that a jury could not find with convincing clarity that The Blade conveyed the defamatory implication alleged "with a 'high degree of awareness of [its] probable falsity,' *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, or 'that [The Blade] in fact entertained serious doubts as to the truth of [its] publication.' *St. Amant v. Thompson* (1968), 390 U.S. 727, 731." *Grau, supra*, at 89. In sum, Mr. Smith failed to provide sufficient evidence of actual malice. For that reason, plus the additional reasons discussed above, his claim fails as a matter of law. See *Connaughton* at 659 and *Varanese* at paragraph one of the syllabus, *supra*.

b. That J.P. Smith has used excessive force against citizens more than once

Mr. Smith attributes this defamatory implication to three passages in the IA series. The first passage appears in the Nichols article, where Roe, elaborating on Murray's statement that the pair sorted through approximately one thousand Internal Affairs files, remarks that,

> "We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, *repeated brutality offenders*, domestic violence cases that turned into public brawls, neglect of duty cases." (Emphasis added.) See The Blade, June 24, 1990, section E, at 5.

The second passage is a "Key Finding[] of Day Two" of the IA series, which propounds, "A handful of Toledo police officers have beaten citizens more than once." See The Blade, June 25, 1990, at 1. The third and final passage contains Ms. Henneman's allegations, which were gleaned from her lawsuit against the City and Mr. Smith. Mr. Smith argues that those allegations are false, although they were accurately reproduced from Ms. Henneman's complaint. See Appendix, Smith, Smith Aff. ¶5; Smith Dep. at 149. The Court recited

those allegations earlier in its opinion.[21] Mr. Smith argues that these passages convey the implication that he used excessive force against citizens more than once because the article mentioning him discusses three police officers and their multiple altercations with citizens. See The Blade, June 25, 1990, at 1, 6.

The Blade, in opposition, argues that it is entitled to summary judgment on this claim because the first two passages highlighted contain no defamatory matter "of and concerning" Mr. Smith. Neither the Nichols article nor the "Key Findings of Day Two" mention him by name or identify him in any way. For this reason, those passages cannot support his defamation claim. See *New York Times Co., supra*, at 288; R.C. 2739.01.

Even if those passages, when read in the context of the entire series, could be construed to imply that Mr. Smith was one of the officers who used excessive force against citizens more than once, Mr. Smith's claim still fails under the innocent construction rule. Presuming that the defamatory implication alleged could arise, the innocent implication, that Mr. Smith was accused of using excessive force against citizens more than once, could also arise. The Blade plainly identifies Ms. Henneman's allegations not as the truth, but as "claims" taken from her lawsuit. In addition, The Blade reports Mr. Smith's version of the same incident. See The Blade, June 25, 1990, at 6. Pursuant to the

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21 The Court also noted found that the fair report privilege protects The Blade's printing of those allegations. See *ante* at 118.

innocent construction rule, the Court must adopt the innocent meaning rather than the defamatory meaning alleged; hence, Mr. Smith's claim fails as a matter of law. See *Yeager* at 372, *Mendise* at 726, and *Sheppard, supra*.

In an attempt to establish that The Blade conveyed the alleged defamatory implication with actual malice, Mr. Smith proffers the same evidence and arguments as he did for his last claim. The Court found such evidence and arguments insufficient to support a jury finding of actual malice with convincing clarity with respect to the former claim and, thus, reaches the same conclusion with respect to this claim. See *ante* at 118-120.

C. That J.P. Smith doesn't have examples of extraordinary performance in his personnel file

Mr. Smith's third and final claim is essentially identical to the parallel claims of Messrs. Barboza, Taylor, and Case. See AC at ¶¶32.C., 17.D., 37.C., and 42.C. Smith, like Barboza, Taylor, and Case, points to examples of extraordinary performance in his files to demonstrate the untruth of this allegedly defamatory implication. See Appendix, Smith. Also like the other police officers mentioned, Smith highlights the following passage from the June 24th Nichols article, "We recognize that cops screw up, but we also know that they do a lot of good things,' Murray says. 'So we went through all the police personnel files looking for

examples of extraordinary performance.'" See The Blade, June 24, 1990, section E, at 5; AC ¶¶32.C.l., 17.D.l., 37.C.1., 42.C.1.

Mr. Smith attempts to bolster his claim and set himself apart from the other plaintiffs by arguing that "[t]he Police Violence article that Smith shares with officer [*sic*] Schaber discussed Schaber's many commendations but none of Smith's having the direct implication that he has none." See AC ¶32.C.l. Mr. Smith erroneously proffers this argument, however, because the article referring to both him and Mr. Schaber does not mention the commendations of either man. See The Blade, June 25, 1990, at 1, 6. Instead, the article mentioning Mr. Schaber's commendations appears in a plainly separate article entitled "Despite IA record, a good street cop." See The Blade, June 25, 1990 at 7. The article discussing both Schaber and Smith also discusses a third police officer, Pete Bolanis. This article does not mention the commendations of any of the persons discussed. As a consequence, the stark contrast between the Messrs. Schaber and Smith simply does not arise.

Because Mr. Smith's third and final claim is based on essentially the same information and arguments as the parallel claims of Messrs. Barboza, Taylor, and Case, the Court finds that The Blade is entitled to summary judgment on this claim for the same reasons it is entitled to summary judgment on the parallel claims of the other men. See ante at 68-71; AC at ¶¶32.C., 17.D., 37.C., 42.C.

8. Other purported evidence of actual malice

a. "Defamation with actual malice falsehoods and defamation showing pattern of actual malice"

In paragraph fifteen of their Amended Complaint, the plaintiffs provide fourteen examples of "Defamation with actual malice falsehoods and defamation showing pattern of actual malice." See AC at ¶15. The plaintiffs offer these purported falsehoods presumably to demonstrate actual malice in connection with the publication of the entire Internal Affairs Series. The plaintiffs object to each of these purported falsehoods, which mention none of the plaintiffs specifically, but rather touch on general aspects of the IA series, i.e, the fairness, credibility, and thoroughness of the series, AC at ¶¶15.A., B., D., E., G., I., J., N., some topics to be covered in the series, AC at ¶¶15. F. , H. , and how the contents of Internal Affairs files were previously unavailable, AC at ¶¶15.C., K., L., N. Many of the plaintiffs used selected alleged falsities from paragraph fifteen to support their individual defamation claims.[22] As such, the Court has already

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22 Illustrative of this use is George Taylor's claim that The Blade defamatorily implied that he was a *repeated brutality offenders* based on a statement contained in the Nichols article, wherein it was stated:

> "We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases." (Emphasis added.) The Blade, June 24, 1990, section E at 5; see also AC at paragraph 15.F. l.; *ante* at

discussed the legal futility of the plaintiffs' attempts to connect these purported falsities with their individual claims.

The material question before the Court is whether, under the totality of the circumstances, a reasonable jury could find, with convincing clarity, that The Blade acted with actual malice in publishing any of the defamatory implications alleged by the plaintiffs. To prove actual malice, a plaintiff must demonstrate that defamatory material was published "with knowledge that it was false or with reckless disregard for whether it was false or not." *New York Times, supra*, at 279-80. A defendant acts with reckless disregard when he or she publishes statements with a "high degree of awareness of their probable falsity," *Garrison, supra*, at 74, or when the defendant "in fact entertain[s] serious doubts as to the truth of [the] publication," *St. Amant, supra*, at 731. Even collectively viewing the alleged falsities

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pp. 71-72.

A second example is Mr. Taylor's claim concerning the passage from the Nichols article in which Murray was quoted as saying "We recognize that cops screw up, but we also know that they do a lot of good things * * * [s]o we went through all the police personnel files looking for examples of extraordinary performance." See The Blade, June 24, 1990, section E at 5; see also AC at paragraph 15.E. l. It was Mr. Taylor's contention that this passage falsely and defamatorily suggested that he had no examples of extraordinary performance in his file because the article mentioning him did not point out that he, in fact, had two commendations in his file, which Roe and Murray knew about. See *ante*, pp. 74-75.

iterated in paragraph fifteen, the Court finds that there is insufficient evidence from which a jury could conclude, with convincing clarity, that The Blade "in fact entertained serious doubts as to the truth of [its] publication" as a whole or any of the individual statements contained therein. Even in light of the items iterated in paragraph fifteen, the plaintiffs have failed to provide sufficient evidence of actual malice; therefore, their claims must fail as a matter of law. See *Varanese, supra*, at 80-81 (plaintiffs' burden of establishing actual malice with convincing clarity must be sustained on a motion for summary judgment).[23]

b. Actual malice and the reprint

On October 11, 1990, a number of plaintiffs in this action filed a complaint with this Court alleging claims of defamation and invasion of privacy. See Complaint. On or about October 19, 1990, The Blade reprinted the IA Series for limited distribution to approximately two hundred journalists at a conference in Detroit. See Ex. 3, ¶¶62-63; Ex. 16. Four of the plaintiffs in this action argue that The Blade acted with actual malice by republishing, in the reprint, the

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23 To the extent that the plaintiffs assert that any of the items highlighted in paragraph fifteen of the Amended Complaint amount to defamation claims, the Court finds them non-actionable. For the most part, the statements in paragraph fifteen amount to mere puffery on the part of The Blade. Moreover, the statements do not defame any plaintiff because they do not contain any defamatory material "of and concerning" any particular individual; therefore, they cannot survive summary Judgment as defamation claims. See *New York Times, supra*, at 288; R.C. 2739.01.

defamatory implications they set forth in their complaint. The plaintiffs argue that, because The Blade was familiar with the allegations in the complaint, it was aware of the falsities contained in the series but, nevertheless, republished those falsities knowing of their untruth or with a reckless disregard for whether they were true or not.

As noted previously, to demonstrate actual malice in connection with an allegedly defamatory publication, a plaintiff must demonstrate, at least, that the defendant made the publication with a "high degree of awareness of [it's] probable falsity," *Garrison, supra*, at 74, or that the defendant "in fact entertained serious doubts as to the truth of [the] publication," *St. Amant, supra*, at 731. This burden "forces a plaintiff to prove what was in a reporter's and publisher's mind." *Mastandrea, supra*, at 230.

The Blade provides undisputed evidence that Messrs. Roe and Murray were responsible for making a limited number of copies of the reprint available at the October 1990 conference for which the reprint was prepared. See Ex. 2, ¶65; Ex. 3, ¶63. The plaintiffs, however, provide no evidence that these reporters in fact doubted the truth of their publication. Instead, the plaintiffs seem to argue that the reporters' mere awareness that the plaintiffs denied the truth of certain items or innuendoes allegedly conveyed by the IA Series is sufficient to demonstrate a reckless disregard for the truth. The court finds otherwise.

There is simply insufficient evidence for a jury to conclude, with convincing clarity, that The Blade published the reprint and, thus, the purported falsities therein, with even a reckless disregard for the truth. The United States Supreme Court has recognized that "the press need not accept denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." (Quotations omitted.) *Connaughton, supra*, at 2698, n. 37. As such, The Blade was not required to accept the denials contained in the plaintiffs' complaint. Indeed, the two reporters having responsibility for publication of the reprint provide undisputed affidavit testimony that the complaint never raised any doubts in their minds as to the truth of the IA Series. See Ex. 2, ¶66; Ex. 3, ¶61.

One plaintiff, Mr. Smith, alleges actual malice in connection with the reprint, but for a different reason. Mr. Smith argues that The Blade acted with actual malice because it reprinted the story discussing his altercation with Ms. Henneman without disclosing that, on September 13, 1990, in a re-trial of *Henneman v. City of Toledo*, Lucas C.P. No. 82-1699, a second jury found that Ms. Henneman failed to meet her burden of proving her claims against Mr. Smith. In support of his claim that this omission amounts to actual malice, Mr. Smith points to a September 14, 1990 news article in which another Blade reporter, Mike Jones, reported the verdict exonerating Mr. Smith. See Ex. 18. Mr. Smith contends that, because The Blade once published this

verdict, it was aware that Ms. Henneman's claims against him were false and, thus, published Ms. Henneman's claims in the reprint in October 1990 with knowledge of their falsity.

In opposition to Mr. Smith's argument, The Blade provides evidence that the individuals responsible for publishing the reprint, Murray and Roe, had not read Mr. Jones' article and were not aware of the second jury verdict at the time the reprint was created. See Ex.2, ¶67; Ex. 3, ¶66. Mr. Smith provides no evidence countermanding this testimony except for Mr. Jones' September 14, 1990 Blade article. It is well established that,

> "the mere presence of conflicting stories in a defendant's own files does not establish that the defendant knew that the ad was false, 'since the state of mind required for actual malice would have to be brought home to the persons in * * * [the defendant's] organization having responsibility for the publication * * *.'" *Varanese, supra*, at 81, quoting *New York Times, supra*, at 287.

Even though some individuals in The Blade organization had knowledge of the jury verdict in his favor, Mr. Smith had failed to bring that knowledge home to the individual's having responsibility for publishing the reprint, Murray and Roe. Moreover, even the failure of Murray and Roe to further investigate the

outcome of Henneman's civil suit against Smith does not amount to actual malice. See *Grau, supra*, at 92.

In light of the foregoing, the Court finds that the plaintiffs have failed to provide convincingly clear evidence from which a jury could find that The Blade published the reprint with actual malice. By failing to provide sufficient evidence on this essential element of defamation, the plaintiffs have failed to 137 sustain their burden on summary judgment; thus, their claims must fail. *Varanese* at 80-81.

POSTSCRIPT

A.

It is hoped that this opinion will be read and interpreted as a strong statement of the primacy of the freedom of the press, especially in relation to lawsuits lodged by public officials. And, it is hoped that the media will be less left to speculation as to what might or might not be deemed actionable. If any of these aspirations become reality, then The Blade's spirited and total defense of this multi-plaintiff, multiple-claim action will sound echoes well beyond the relatively narrow boundaries of the "Secret Files" series itself. Because, if this opinion and The Blade's vigorous defense can inhibit the lodging of future and specious defamation and privacy actions, then other publications will be spared the chilling and enormously expensive experience of defending what should be well-defined, well-protected, and well-understood rights.

The "Secret Files" series, to be sure, marked a sharp journalistic departure for The Blade, venturing as it did into the thicket of investigative reporting. The series was the immediate product of a determined and laudable effort to define what constituted public records in Ohio. For this reason alone, the series is significant.

But, it is also clear that some important community benefits inured as a result of the series. The seamy, contemptible practice of individual officers dispensing "courtesy cards" to favored friends and relatives was apparently stopped cold. An apparent policy of sparing officers arrest and prosecution for offenses that would be vigorously pressed against private citizens was exposed to public view. The dubious overuse of TPPA headquarters on Ashland Avenue as a private watering hole for off-duty police was curtailed, at least for a time. Attention was focused on recruitment policy and methods. Significant changes were promulgated as to the disposition of citizen complaints relating to police misconduct. And, the public was educated as to the internal affairs process within the Toledo Police Department, as to the history of that process, and as to its occasional abuse.

Then, too, The Blade's strong call in summing-up the editorial of July 1, 1990 led to the formation of a Citizen Advisory Review Board, a group that would become centrally involved in the complaint process. There has been little follow-up as to the results or changes wrought by the Review Board, and it is true that the history of such Boards has been uneven in

other locales (Philadelphia, to name one such city). Still, the change seemed significant at the time, and there can be little doubt but that it was brought about by the "Secret Files" series. In this regard, and in the others mentioned
above, the overall purpose and the overall effect of the series was in keeping with the valued role of a free press in our society.

Just as importantly, it needs to be understood - by litigants, counsel, other members of the police department, and members of the public - that the series was not an unqualified success when measured against a "fairness index." Presumably, this opinion has made it crystal clear that "unfair" and "actionable" are not equivalents in the context of defamation and privacy claims pressed by public officials against print media defendants. This, in no way, suggests that the overall thrust of the series was unfair - it was not - nor should it be interpreted that the reporters responsible for the series did not work hard and effectively in compiling a lengthy list of police misdeeds. But, to anyone who remains confused, once again it is stressed that, absent the clear commission of one of the contextually defined torts (coupled with the stringent "actual malice" standard), there can be no liability, unfairness notwithstanding. This seeming anomaly, if anything, strengthens the sweep of the freedom itself, and bears some examination.

This series was "hyped" to the public throughout its eight- day run by both written and electronic

advertising. It was ballyhooed as a monumental exposure of long-suppressed and sinister records of police misconduct, dating back over seventeen years. Purported witnesses to or victims of such misconduct were questioned in television advertisements with their visages obscured, as if to suggest that they were potential targets of reprisal. Nowhere in all of this Barnum-like clamor was it stressed that the Internal Affairs records secured by The Blade through court action had been, in fact, confidential by operation of state law until the court-dictated change. The records were not kept secret by some special and sinister acts of Toledo Police Department operatives. Indeed, the reasons that internal affairs records were previously deemed confidential had much to do with the fact that officers accused of misconduct and hailed before IA did not possess the same Fifth Amendment rights that private citizens could assert.[24] Officers were bound to cooperate with IA, or face dismissal. The Supreme court wrestled with this conundrum in ultimately and correctly finding that the public had an overriding interest in having these records aired. They weighed countervailing public policy interests, *viz.*, the public's right to know versus an officer's personal rights and privileges.

As to specific anecdotes recounted in the series, and issues of purported "unfairness," the plaintiffs have made much of the Nichols piece that appeared on the

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24 The records were also kept confidential as an element of duly-negotiated union contract provisions then in effect.

June 24, 1990 Op-ed page. It is hoped that the Court has made clear that this piece, despite its plaintive claims and unprofessional puffery, in no way altered the elements of the torts urged, nor the constitutional defenses available to the defendant. That some of the Op-ed claims went unfulfilled (e.g., "...the pair set out to recreate key incidents, talking with persons associated with those cases: the officers, their commanders, victims and bystanders" and "...so we went through all the police personnel files looking for examples of extraordinary performance.") cannot change the standards by which The Blade is judged in this opinion.

As noted in the opinion, neither Roe nor Murray ever contacted officers Case or Taylor to secure their versions of the lawsuit settlements described. And, with the exception of the side bar on Officer Martin Schaber, the eight-day series discloses no example of "extraordinary performance" by any of the officers mentioned, notwithstanding the fact that several had been decorated or cited for bravery and/or civic contributions.

The Nichols piece aside, it is also difficult to understand the journalistic decision that led to the public disclosure of the names of Donald Lewis' two former wives, both victims of his abusive behavior and both privacy plaintiffs herein. Similarly, it is difficult to fathom why Officers Kim Kristoff (Kim Little in the Day 4 sidebar as to Officer Brian Vasquez) and Officer Barbara Alexander were named in this anecdote. Both were blameless victims of officer Vasquez' violence; both

pressed charges against Vasquez (Alexander in Toledo Municipal Court, and Kristoff through Internal Affairs); and none of the other four civilians cited as victims of Vasquez were named. It is difficult to understand why it is more credible to specifically name and embarrass these officers. As noted above, if it was or is relevant that they were police officer victims, they could have been identified as "two female police officers."

There are other examples of questionable journalistic decisions in the "Secret Files" series, though none involved any of the plaintiffs in this action. Several stand out. The Willys Park sex scandal of 1971(nineteen years before the series and two years before the formation of the Internal Affairs squad) was discussed at some length, and the names and punishments of the various officers were listed. Several of these officers were in their mid-twenties in 1971, and were also single. They were in their mid-forties at the time of the series, and several were married with teen-aged children. There is no question that the incident had some historical relevance to the Internal Affairs series, as it was one of the reasons the IA unit was formed. Nevertheless, it is difficult to understand why names and punishments were printed, *especially since the entire incident* (including officers' names and punishments) *was reported on the pages of The Blade contemporaneous to the incident sanctions*. This decision was not the stuff of Pulitzers.

Mention was also made in the series of a pre-Internal Affairs shooting at the Apartment Lounge

on Sylvania Avenue, wherein officer Lawrence Edinger shot and killed a civilian, while the sole participant in a drunken and vicious game. The incident was bizarre and macabre, but it was fully reported in The Blade contemporaneous to the shooting. Edinger was identified, the resulting criminal case was closely followed, the prison sentence Pulitzers. was documented, and the course of the ensuing civil litigation was set forth. No mention is made of the previous publication, an omission which casts this most disturbing instance of police instability and violence within the Blade-described category of suppression, coverup and deceit. It was none of those things.

Then, too, it is possible to contend that the entire Toledo Police Department was besmirched by the series, its leering advertisements, and some of the conclusions. one would hope that there would be no incidents of police misconduct at all, but that is not a realistic expectation with regard to an urban police force of 750 officers, give or take. Much was made of the amount of money that was paid out by the City of Toledo over the seventeen year period covered by the records reviewed (roughly $1.4 million), but this works out to about $85,000 per year. This figure is too much; any such figure would be; but it is hardly staggering when compared to the experiences of comparable-sized city forces. Also, it is worthy of note that - despite the voluminous records culled by the reporters, as dramatically noted in the Nichols piece there is not a single instance of financial malfeasance, bribery or theft noted.

The Blade ran a summing-up editorial as part of the coverage on the eighth and final day of the series (July 1, 1990). That front page editorial was the final segment of the entire series. Viewed thusly, the penultimate paragraph of the series reads in significant part as follows:

> We rush to emphasize that the great majority of Toledo policemen do indeed measure up. Most are dedicated professional law enforcement officers who are no doubt pained by the series but at the same time eager to see the division's severe problems corrected.

The rush, perhaps, was less than headlong. These qualifying sentences might have been better placed at the outset of the series.

B.

This decision has been far too long in process, and much of the blame for that may be placed directly at the chambers door of the Court. Thus, a few words are in order to explain the circumstances surrounding the issuance of this opinion.

The opinion is certainly one of the longest ever filed in this county, and perhaps this state. It has gone through countless rewrites, including several short-form versions, and has been delayed on occasion

by personnel shifts which have compelled duplicated research. Without duplication, the research underlying this opinion has included several people reading every case cited by either side that appears in the seven or eight cardboard boxes which house the case file. Ultimately, the Court saw no alternative but to do a painstaking analysis of each of the separate claims of each of the separate plaintiffs. In this regard, it was difficult to wrestle with the sheer volume of the decision, organizationally. By way of example, this case produced roughly 2,500 pages of depositions, and the briefs from both sides contained hundreds and hundreds of case citations. Moreover, the exhibits tendered with regard to the summary judgment motion fill several cardboard boxes. Inevitably, the periodic press of a hectic trial docket caused the working draft to be put aside as a long-term project which, in turn, mandated a lengthy re-immersion at each revisit. Too often, this long-term project got put aside as thousands of other cases were processed, and hundreds of opinions issued.

This Court accepts a significant share of the blame for the delay, especially since the direction of the decision was apparent fairly early on. But, there were other reasons why the preparation of this opinion was so drawn-out and time consuming. These reasons have to do with the lazy, shabby, inexcusably negligent and untrustworthy nature of the research and briefing done by plaintiffs, counsel in this case. Everything submitted to the Court by the plaintiffs.- from case citations, to quotes, to questions of appositeness, and assertions as

to holdings - had to be double and triple checked. Every single case cited by the plaintiffs, in any brief or memorandum, was read, reread, reviewed and sheperdized by the Court and its clerks who worked on this decision. This is because, early on, the Court found instances of seemingly trivial errors and stylistic shortcomings in plaintiffs, filings, as well as substantive misstatements and misrepresentations as to principles of law, and holdings. These latter problems went far beyond laziness, sloppiness or inexcusable negligence.

The less serious errors and shortcomings can be found throughout plaintiffs' filings. They include erroneous case citation, evidenced by improper punctuation, mistaken abbreviations, erroneous capitalization, as well as misidentification of courts, case names, and jurisdictions. In some instances, an initial citation identifies only the case name and county. In others, a case referred to for the first time mentions but one of the parties' names in the caption with no citation. There are also instances of obvious mistaken citation, such as 483 P.2d 34, at 871.

Throughout plaintiffs' briefs and memoranda there are an inordinate number of typographical errors, in addition to obvious mistakes in capitalization, punctuation, and spelling (including misspellings of even plaintiffs' names in certain instances). one concludes that the filings could not even have been given cursory proofreading.

Moreover, the 'organization of legal arguments

into distinct paragraphs is virtually non-existent, little attention is paid to sentence structure, and there is little, if any, continuity of thought or argument. See, for example, the Privacy Opposition at 5 and 5A.

The filings submitted by the plaintiffs are prone to recite statements of law, such as the elements of the invasion of privacy tort, without crediting any source or authority. They are replete with statements of fact with no reference to the record. Also, these filings contain several instances of dealing with legal arguments or issues by simply setting forth lengthy lists of case citations and minimal summaries, with no prose commentary, no analysis, and no effort to tailor, distinguish, or stress certain key aspects of these decisions. See, for example, Privacy Opposition at 16-18. This recurring tendency to "scatter-cite" or "string-cite" cases is of virtually no assistance to this or any court, nor to any reader, without meaningful analysis. In fact, when the string-cited cases are checked, they often do not stand for the principles implied in the listing; some in fact support the flip side of what is being implied, by supporting the defense position on a given issue. In this respect, such practices are counter-productive in the extreme.

Much of the foregoing, at least in isolation, could be excused as sloppy or negligent, and criticism of very occasional errors in citations, punctuation and so forth might be deemed trivial. But the minor errors in plaintiffs' filings are not isolated, they are legion. And, the cumulative impact is profoundly inimical to the

interests of the individual plaintiffs. Moreover, the sloppy practices are moderately insulting to the Court, to opposing counsel, and to prospective readers, as they convey an "I can get away with this" approach to research and writing.

There are, however, other instances of more serious errors in plaintiffs, filings in this case. That is, there are instances of serious misrepresentations as to the holdings of highlighted cases - instances which must be presumed to have been deliberate. In certain instances, as will be documented below, cases are cited for propositions of law unstated and not held in the decision noted, and information as to subsequent reversals and/or reconsiderations is withheld from the Court. These examples are serious, even egregious. They are seamy and sordid, and exceed what could be condemned as excusable neglect. There are six especially glaring examples of this kind of unprofessional conduct. Unfortunately, they bear separate and specific examination.

Plaintiffs, in their Memorandum Contra Motion for summary Judgment as to Defamation Plaintiffs ("Defamation opposition"), cite the case of *Jacobs v. Frank* (Dec. 21, 1989), Cuyahoga App. No. 56317,1989, 155151, unreported, in support of their claim that reporters Roe and Murray acted with the requisite level of malice as to certain aspects of the series. Specifically, plaintiffs' counsel cites *Jacobs* as standing for the proposition that actual malice is shown where a defendant had "obvious reasons to doubt (the) truth of

(an) informant or (the) accuracy of his report." Defamation Opposition at page 15-16.

Jacobs, however, does not discuss the use of informants, nor does it discuss whether having obvious reasons to doubt the accuracy of his report is sufficient to demonstrate a reporter's actual malice. Rather, the Court of Appeals ruling in Jacobs mistakenly holds that a showing of the constitutional actual malice standard is not required in cases involving the peer review context set forth in R.C. 2305.25. According to *Jacobs*, common law malice or ill will is sufficient to defeat the privilege under R.C. 2305.25 The *Jacobs* decision by the Cuyahoga County Court of Appeals, however, was and is wholly irrelevant to the issues presented in this case. The privilege limned in R.C. 2305.25 (having to do with hospital peer review committees, for example) had nothing to do with this case, and was never raised in this litigation, except through this mind-boggling piece of legal research and writing.

Moreover, and even more incredibly, plaintiffs' counsel chooses not to divulge the significant fact that the Court of Appeals decision in *Jacobs* was reversed by the Ohio Supreme Court. See *Jacobs v. Frank* (1991), 60 Ohio St.3d 11. Indeed, the Supreme Court ruled that the constitutional actual malice standard applicable in public official defamation cases - and not the common law malice standard - was also applicable in peer review cases under R.C. 2305.25. 60 Ohio St.3d at 116. In fact, in reversing the inapposite Court of Appeals ruling cited by plaintiffs' counsel in this case the Ohio Supreme

Court confirmed that the constitutional actual malice standard may be defined as "acting with knowledge that the statements are false, or acting with reckless disregard as to their truth or falsity." *Id.* Thus, Jacobs, as it eventually played out, provided absolute support for the standard consistently urged by *defendant's* counsel.

There are two other egregious examples of plaintiffs' counsel's misrepresentations as to the actual malice standard. In their Defamation Opposition at page 14, plaintiffs cite *Southern Air Transport, Inc. v. American Broadcasting Co.* (D.D.C. 1987), 670 F. Supp. 38, reconsidered (D.D.C. 1988), 678 F. Supp. 8, affirmed (D.C. Cir. 1989), 877 F.2d 1010. Plaintiffs' counsel represent that actual malice is shown where the challenged portions of a story are made up, or are a product of the defendant reporter's imagination. In fact, *Southern Air Transport* does not even discuss the actual malice standard. The case had to do with the existence of potentially defamatory implications and construction. The court in the *Southern Air Transport* decision, cited by plaintiffs in this case, denied a motion for summary judgment lodged by the media defendant, based upon its conclusion that reasonable viewers might have regarded the defendant's television broadcast as implying defamatory facts about the plaintiff. 670 F. Supp. At 43-44. The defense in that case had argued that the broadcast was not susceptible of the defamatory construction urged by the plaintiff as a matter of law. *Id.*

Plaintiffs' counsel in this case might thus transfer the *Southern Air Transport* decision they mistakenly cite as loosening the strictures of constitutional actual malice in another area of the brief, had they actually read the decision, although this would pose a problem of ethics and candor as well. Because, on reconsideration urged by the media defendant, the court revised its opinion and granted summary judgment. See *Southern Air Transport, Inc. v. American Broadcasting Co.* (D.D.C. 1988), 678 F. Supp. 8. Thus, plaintiffs' citation to this case is misleading in substance, and their reference fails to divulge the fact that the decision was reversed!

Further, in Defamation opposition at page 14-15, the plaintiffs cite *Kennedy v, Ministries, Inc*, (E.D. Pa. 1984), 10 Media L. Rep (BNA) 2459, as holding that actual malice is demonstrated (1) by evidence that the defendant made up portions of the challenged publication and (2) by evidence that the publication at issue is so inherently unbelievable that only a reckless person would put it in circulation. The mention of "made Up" rings ironic at a minimum, because *Kennedy* does not contain the legal conclusions posited by plaintiffs' counsel, and it does not even discuss the issue of actual malice! See , 10 Media L. Rep. At 2459-2461.

Another remarkable example of legal misrepresentation may be found in the plaintiffs' citation of *Pepe v. Pepe* (N.J. Super. 1992), 609 A.2d 127. They state, in their Memorandum Contra Defendant's Motion for Summary Judgment with

Regard to Privacy Plaintiffs Maroks, Kristoff, Lewis and Leichty ("Privacy Opposition") at pages 12-13 that public access to government records relating to domestic violence may be completely blocked by legislative enactment. *Pepe* involved the efforts of a New Jersey newspaper to obtain access to court records relating to proceedings in a domestic violence case. Plaintiffs' counsel asserts in the Privacy Opposition at page 13 that the *Pepe* court "denied the press argument that it had a First Amendment right of access to documents in the Court File."

In fact, the *Pepe* court granted press access to the specific documents sought, confirming in the process a First Amendment right of access to judicial records relating to domestic violence. 609 A.2d at 129-131. Parenthetically, it is noted by way of full disclosure (a concept plaintiffs' counsel would do well to adopt in briefing) that the underlying New Jersey statute was deemed valid because the process established permitted the constitutionally-required case-by-case analysis of whether the government interest in withholding court records of domestic violence was outweighed by the presumptive right of public access. *Id.* at 130. Obviously, in *Pepe*, that balancing favored public access.

Next, in pressing the claims of Pamela Marok as to The Blade's in-series discussion of her psychological examination, plaintiffs' counsel asserts that the defense-cited State, ex re. *Toledo Blade v. Telb* (1990), 50 Ohio Misc.2d 1, was not relevant to Ms. Marok's claims because it did not deal with the issue of whether

access to psychological or medical records is permitted under Ohio's Public Records law. This curious assertion appears in the Privacy Opposition at 14-15, and in Plaintiff's [*sic*] Post Hearing Memorandum Regarding The Privacy of Plaintiffs ("Plaintiffs' Post-Hearing Memorandum") at 1-2. The assertion of plaintiffs' counsel in this regard is simply false, as a quick reading of *Telb* would reveal. The actual holding in *Telb* was that a psychological evaluation of a law enforcement officer conducted for the purpose of determining that officer's fitness for duty is ***not*** exempt from disclosure under the public records statute as a "medical record." See 50 Ohio Misc.2d at 10.

Finally, in this abbreviated list of the more egregious legal misrepresentations made by plaintiffs' counsel over the history of this case, they cite *Deaton v. Delta Democrat Publishing Co.* (Miss. 1976), 326 So.2d 471 as holding that "just because persons with a disability were attending public schools as a matter of public record, and that the issue of such attendance was newsworthy, the publication of their names and photos and identifying their mental condition as retarded was not newsworthy nor a matter of legitimate concern to the public." Privacy Opposition at 20. Plaintiffs' counsel is thus citing *Deaton* for the proposition that publication of matters of public record may constitute and actionable invasion of privacy. In fact, *Deaton* held that "* * * the information published was not taken from public records, but was by state law made unavailable to the public." 326 So.2d 473 (emphasis supplied.). Then the *Deaton* court went on to confirm

that its holding did not conflict with the rule that "* * * there is no liability when the defendant merely published something about someone else which is already public or constitutes matters of public concern." *Id.*

It should be obvious that the individual plaintiffs in this case were not well served by their counsel. For most of them, substantively, there was little chance of surviving even summary judgment short of complete abandonment of the actual malice standard in public official defamation cases. Also, of course, almost all of the anecdotes which came under examination in this case were true - the vast majority of those specifically true, and the remainder accurate in gist and sting. All of the challenged anecdotes were based on public records, made so in the wake of *Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St.3d 79, and were based on events within the public domain. Given these circumstances, one wonders what the individual plaintiffs were told by counsel at the outset.

Regardless, it is equally clear that the individual plaintiffs were not well served by the conduct of plaintiffs' counsel in this case. The earlier portions of this postscript recount the plethora of errors and misrepresentations in the written filings submitted by plaintiffs' counsel. And, the Court's earlier judgment entry of April 17, 1992, sets forth the extensive and serious problems caused by plaintiffs' counsel during the discovery phase of this case. That entry, it is recalled, imposed monetary sanctions against plaintiffs,

counsel in the amount of $18,981.50, a figure intended to reimburse the defendant newspaper for costs and legal expenses incurred as a result of the earlier discovery misconduct. Parenthetically, it is noted that payment of this fine was due on or before June 1, 1992 and, not surprisingly, it has not been paid as of this writing. For the record, the appropriateness of that earlier fine is emphatically reiterated, and the amount should include statutory interest from June 1,1992. It may be that plaintiffs' counsel are assuming that this fine may be appealed now, rather than following the time it was imposed or due. That is an issue that will be determined by the appellate court, and this Court's assumption as to the intentions of plaintiffs' counsel as regards the fine is purely speculation.

It is clear, however, that the imposition of the fine had no salutary effect on plaintiffs' counsel's conduct, as many of the substantive mistakes and misrepresentations were made in filings posted *after* the discovery-abuse sanctions had been imposed. That circumstance adds arrogance to the list of plaintiffs' counsel's offenses in this case.

Many times over the years, in complex litigation which requires a good deal of briefing, a disparity will emerge in the writing and research skills of one side against another. Usually this is not necessarily predictive of the outcome of the case, and superior expository skills are often counterbalanced by the law in a given area, by the prevailing or presumptive facts in a given case, or by an honest and candid presentation

of the law and policy arguments in a workmanlike memorandum.

This Court has never encountered a case in which the differences in expository skills were as stark and divergent as this one. Because, aside from the mis-cites and misrepresentations as to holdings, the submissions of plaintiffs' counsel were remarkably sloppy and disorganized; in some instances, they were virtually unreadable. Defendant's filings, on the other hand, were extremely well written and researched, and always germane and trenchant.

The divergence notwithstanding, however, it should also be stressed that better presentation by the plaintiffs - even first-rate presentation - probably would not have made much of a difference, for the simple reason that the existing case law and relevant societal policy was and is stacked against a public official claiming defamation, and all of the plaintiffs who are police officers are clearly public officials in this context.

It has been and is both a finding of this opinion and a conclusion of this Court that the First Amendment is a virtually impenetrable shield against public official defamation lawsuits. It is also a conclusion that this relatively settled state of the law is a good thing. Absent falsity or reckless disregard for the truth or falsity, the press will be free to investigate and print articles challenging our institutions and those who direct them.

It is equally clear, however, that this country is experiencing a growing concern and a growing cynicism with regard to the role and function of the press in American society as we approach the 21st century. Many seem to think that the press has become too sensationalized, driven by an obsession with sales and scoops. Certainly some of this cynicism is the result of a number of high- profile criminal cases (*viz.*, William Kennedy Smith, Lorena Bobbit, and, of course, O.J. Simpson) covered daily by the print media, and presented day-after-day on the electronic media. Testimony has been presented live and in color on a daily basis; arguments of counsel, up to and virtually including side-bar conversations with the Court, have been depicted; speculation as to facts yet to be presented has appeared weekly, if not daily, without particular regard for corroboration or veracity; indeed, some of these accounts have been purchased through "check book journalism," a seamy and relatively recent journalistic phenomena; and endless commentators have been found to criticize, praise or psychoanalyze the strategy of trial counsel. In this context, it is not surprising that the reputations of both the criminal justice system and the media have suffered. And, according to a poll published in the *ABA Journal* of October 1994, the reputation of the press declined more precipitously than the criminal process in the wake of the Simpson criminal trial: 56% of those polled had a lower opinion of the press, while 28% had a lower opinion of the criminal justice system.

This wave of resentment, if that is what it is, has

no specific relevance to this case, nor to this opinion, other than to introduce what has been a disquieting trend in court decisions in recent years which impinge to some real degree on the ability of the press to function. A view depicting that resentment has been summed up thusly:

> The Press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread in the columns of daily papers.

This view, framed perhaps a little more decorously than might be expected today, was set forth by Samuel D. Warren and Louis D. Brandeis more than a century ago, in "The Right to Privacy," 4 Harv. L. Rev. 193 (1890). But the view has been echoed in recent years not only by members of the public, but by members of the Fifth Estate as well (see, generally, Howard Kurtz's *Media Circus*, Times Books/Random House, and James Fallows' *Breaking the News*, Pantheon Books/Random House, 1995; Kurtz is the press critic for the *Washington Post* and Fallows is the Washington editor of *The Atlantic Monthly*, an occasional commentator on National Public Radio, a former reporter, and a former presidential speech writer).

These factors, and others, may impact especially in the privacy area. The court in *Florida Star, supra*, warns that the entire area of invasion of privacy is "...somewhat uncharted". *Id.* at 530. Also, it seems clear that, in the general privacy area, truthful publication is not automatically afforded constitutional protection. As a general cautionary note, interested readers are referred to a chapter entitled "*Privacy vs. The Press*," which appears in *The Right to Privacy*, by Ellen Alderman and Caroline Kennedy, Vintage Books/Random House, February, 1997. That chapter sets forth a series of cases in which the courts have wrestled with what constitutes an invasion of privacy where the facts reported are undeniably true. The inevitable, if unsettling, conclusion is that actionability will be determined on a case-by-case, highly subjective basis.

There have been several recent decisions that present additional challenges for editors and/or news directors. One of these is *Food Lion, Inc. v. Capital Cities/ABC, Inc.* (U.S. Dist. Ct., Mid. Dist., N.C., 5-9-97), LEXIS 6962. This case involved an undercover story that ABC television news did for their network show "Prime Time Live." Undercover operatives for ABC presented false backgrounds and references to the Food Lion grocery chain in an effort to become employed, so that they could confirm or reject tips they had that Food Lion was systematically mismarking and selling tainted meat products. The operatives, once hired, were able to confirm the reports, and were able to record corroborating video evidence by means of concealed

cameras. There was no showing in this case that the resulting story was anything but true. But, a substantial judgment was entered on a fraud theory against the network. In effect, the reporters' methods were punished, notwithstanding the demonstrably truthful nature of their disclosures.

In *Clift v. Narragansett Television. L.P.* (1996) 688 A.2d 805, the Rhode Island Supreme Court reversed a lower court ruling granting summary judgment to the television station base, apparently, on something of a negligence theory. In May of 1993, a man named Bruce Clift was observed by his wife as he sat armed in an upstairs window of the family home. He indicated to her that he was finally going to follow through on previous threats to commit suicide; he had a prior history of mental problems. Police were summoned to the house by the wife and by reports of Mr. Clift's sporadic gunfire. Police gathered outside along with a few members of the media. The confrontation lasted for several hour and, at one point, involved a specially-trained police hostage negotiator speaking with Mr. Clift over the telephone. As luck would have it, 6:00 loomed, and several stations sought to feature this evolving and dramatic story. A reporter for the defendant unaccountably got through by phone to the Clift residence and spoke with Bruce Clift sometime before the six o'clock news; she did this without gaining clearance from the police or from any member of the Clift family. Clift agreed on tape that the conversation between himself and the reporter could be played on the six o'clock news broadcast. It was played

at 6:04 p.m., following an emotionally charged introduction by the reporter in question, who was at the scene. The text of the conversation is reprinted in the opinion and it simply confirmed Clift's decision to kill himself. At 6:07 p.m. , he did so and, when police entered the residence thereafter, they found the television set tuned to the defendant's station.

This case was thrown out at the trial court level, but it was reinstituted and thus cleared for trial by the Rhode Island Supreme Court. It was cleared on what amounts to the arguable viability of a "reporter negligence" theory. Given the decedent's mental history, and his predisposition to commit suicide, this is a chilling decision for the press, should the resulting trial be favorable to Clift's estate, and should it be further affirmed on appeal. One can certainly argue or observe that the reporter's phone call under these circumstances was ghoulish and in poor taste, but that should be a far cry from actionable.

It is inevitable that the role and function of the press in the privacy and other areas, will continue to be argued and discussed, both within and without the profession. It is equally inevitable that courts will continue to wrestle with certain standards and precedents, and that they will occasionally hand down anomalous decisions which pose threats to all elements of the media. Unfortunately, it is likely that certain of these opinions will turn upon the vagaries and intensity of public taste and cynicism, rather than constitutional standards.

It is probably also true that certain elements of the press will occasionally give meaning to the snide observations of Oscar Wilde:

> "The public have an insatiable curiosity to know everything. Except what is worth knowing. Journalism, conscious of this, and having tradesman-like habits, supplies their demands." Oscar Wilde, *The Soul of Man Under Socialism*,1891.

Notwithstanding, the future role of the print media in our society should be shaped by constitutional principles which take into account the overriding need for fostering the free exchange of information, even at the expense of occasional injury to feelings or reputations. This role and, indeed this duty, was outlined succinctly by Geneva Overholser, editor of the *Des Moines Register*, as follows:

> "Our role is not to suppress difficult information. We've got to be willing to offend people." Quoted in *Media Circus*, *supra*, at 154-155.

Ultimately, Overholser's approach is more consonant with fundamental fairness in a democratic society. And, it is vastly preferable to undue restraint and censorship, or the threat of financial sanctions for printing the truth.

JUDGMENT ENTRY

It is ORDERED that the motion for summary judgment filed by the defendant, The Toledo Blade Company, is GRANTED.

This is a final appealable order.

July 8, 1997

William J. Skow, Judge

Court of Appeals No. L-97-1286
Trial Court No. C190-3434

IN THE COURT OF APPEALS OF LUCAS COUNTY

Michael Dennis Early, et al., Appellants

v.

The Toledo Blade, Appellee

OPINION AND JUDGMENT ENTRY

Decided: October 9, 1998

George C. Rogers and James D. Godbey, for Appellants.
Fritz Byers, for Appellees.

FILED: COURT OF APPEALS
OCTOBER 9, 1998

HANDWORK, P.J. This is an appeal from a July 9, 1997 opinion and judgment entry of the Lucas County Court of Common Pleas, in which the court granted summary judgment to appellee, The Toledo Blade ("The Blade") on claims for invasion of privacy and defamation

brought by appellants. Appellants are ten individuals[1] who were named in articles from a special series titled: "The Secret Files of Internal Affairs" that was published by The Blade from June 24, 1990 to July 1, 1990. The articles in the series revealed information reporters working for The Blade learned primarily from a review of the internal affairs files of the Toledo Police Division.

Appellants have presented five assignments of error for consideration on appeal that are:

> "Assignment No. 1
> The trial court erred in failing to accept as true for summary judgment purpose all the evidence and inferences in favor of the plaintiffs and erred in apparently weighing the evidence.
>
> "Assignment No. 2
> The trial court erred by excluding the testimony of plaintiffs, linguistic expert, P.K. Saha, and plaintiffs' journalism expert, David Jamison.
>
> "Assignment No. 3
> The trial court erred in granting summary judgment dismissing the defamation claims of

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1 The names of the ten appellants are: Michael Dennis Early; George J. Taylor, Jr.; Robert R. Case; John P. Smith; Robert L. Barboza; Kimberly L. Kristoff; Martin Schaber; Mary Ann Hodak; Linda Leichty; and Jane Lewis. Two plaintiffs in the trial court, Edwin and Pamela Marok, chose not to appeal.

plaintiff police officers Hodak (Rose), J.P. Smith, Taylor, Case, Schaber, Barboza, Early.

"Assignment of [sic] No. 4
The trial court erred in granting summary judgment dismissing the invasion privacy [sic] claims of Kristoff, Lewis and Leichty.

"Assignment of [sic] No. 5
The trial court erred in awarding discovery sanctions for conduct occurring prior to the court notifying counsel that it was not going to require defendant to comply with the civil rules and local civil rules pertaining to discovery and the Court did not incorporate the sanctions order in its final judgment."

We will first consider the arguments relating to the fifth assignment of error.

In support of their fifth assignment of error, appellants contend that their trial counsel should not have been sanctioned for discovery violations. Appellants argue that the trial court: 1) should have given advance notice it was going to grant The Blade leave of court to propound more than thirty-five interrogatories before it sanctioned their trial counsel for not filing responses to the interrogatories; 2) should have given them notice that it was not going to require The Blade to provide at least one inch of space between interrogatories for appellants to provide answers before it sanctioned their trial counsel for referencing

responses to another document; and 3) should have given them credit for good faith because they offered an "open file" discovery to The Blade.

The Supreme Court of Ohio has ruled that an appellate court can only reverse a discovery sanction if the trial court abused its discretion when it imposed the sanction. *Nakoff v. Fairview General Hospital* (1996), 75 Ohio St.3d 254, syllabus. The supreme court said in its opinion:

> "In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Id.* at 256.

Civ.R. 37(A) governs sanctions for discovery violations and provides, in pertinent part:

> "(A) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:
>
> "***
>
> "(2) Motion. If a *** party fails to answer an interrogatory submitted under Rule 33, *** the discovering party may move for an order

compelling an answer or an order compelling inspection in accordance with the request.***

"(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

"(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

Keeping these standards in mind, we now turn to the
facts and procedure that led to the trial court imposing sanctions upon appellants' trial counsel. A chart showing the events that led to the trial court's ruling follows:

February 19, 1991-	The Blade serves interrogatories on the appellants named as plaintiffs in the first complaint.
March 19, 1991-	The responses are due. Appellants' counsel told

counsel for The Blade, in the presence of the trial court, that answers would be given within one week. No answers were provided at the promised time. Two other deadlines passed with no answers.

April 8, 1991- Appellants file what the trial court calls "responses of a sort ***." Many questions were answered by referring The Blade to a document prepared by plaintiffs, counsel in which all of the plaintiffs, claims were summarized. The document was titled "Falsehoods and actual malice summary".

May 16, 1991- The Blade's counsel sent appellants' counsel a letter explaining why it believed the responses were inadequate.

June 28, 1991- Appellants' counsel sent a return letter that the trial court said "addressed in vague terms some of the issues raised by The Blade

in its letter, and offered no resolution, unless defendant was willing to capitulate to the plaintiffs, views of the proper uses of various kinds of discovery."

July 15, 1991- The Blade's counsel sent another letter to appellants, counsel to try to resolve the problem informally.

The Blade receives answers to interrogatories from three of four new plaintiffs who were added to the case by amended complaint. The answers mirror those provided earlier by the original plaintiffs.

August 14, 1991- The Blade receives answers from the fourth new plaintiff, thirty days after a voluntary enlargement of time to respond had expired.

August 21, 1991- Appellants' counsel send a letter to counsel for The Blade that says, in pertinent part: "I am just about fed up with the epithets, whining

and [*sic*] false statements contained in your letters. It is unprofessional. If you think that you have some basis to complain about my discovery or cooperation you should seek your remedy in Court. I have as politely as possible repeatedly made our position as clear as possible."

August 27, 1991- The Blade files a motion to compel appellants to respond fully to The Blade's first sets of interrogatories.

September 3, 1991- Trial court grants a request from The Blade to file additional interrogatories on two plaintiffs (Edwin and Pam Marok).

September 16, 1991- Appellants file a memorandum in opposition to the motion to compel.

September 27, 1991- Oral hearing held on the motion to compel.

December 23, 1991	The Blade files a second motion to compel because no responses were filed to the additional interrogatories served, with leave of court on Edwin and Pam Marok.
March 2, 1992-	The trial court grants the motions to compel. It gives appellants, counsel ten days to "show that their opposition to defendant's discovery and motions to compel was substantially justified or that other circumstances make an award of damages unjust."
March 20, 1992-	Appellants file a memorandum, with leave of court, arguing that sanctions are not warranted.
March 25, 1992-	The Blade files a response to the memorandum.
April 3, 1992-	The trial court rules that sanctions are warranted and requests proof of fees and costs from The Blade.
April 9, 1992-	The Blade files proof of fees

and costs.

April 17, 1992- The trial court orders appellants, trial counsel to pay $18,981.50 of fees and costs to The Blade as a sanction for discovery violations.

We have carefully reviewed the record, and conclude for the following reasons that the trial court did not abuse its discretion when it imposed sanctions upon appellants' trial counsel. First, the trial court had no obligation to inform appellants, trial counsel that it would allow The Blade to serve more than thirty-five interrogatories on each appellant. As the trial court noted in its March 2, 1992 opinion, appellants, trial counsel agreed to waive limits on the number of interrogatories served. Accordingly, The Blade did not need leave of court to serve additional interrogatories on appellants.

If appellants' trial counsel later thought The Blade took unfair advantage of the agreement, they could have sought relief. Instead, the record shows they chose repeatedly to tell the trial court and counsel for The Blade that they would give answers by a certain date. Each time, the agreed upon date came and went with no answers provided by appellants.

Second, this court is unpersuaded by the argument that the failure of The Blade to provide at least one inch

of space for each answer freed appellants from the obligation to provide separate answers to each interrogatory. As the trial court noted, by filing untimely answers, appellants waived the right to raise objections to the interrogatories.

In addition, even if the failure to provide adequate space was objectionable, appellants, counsel again could have sought a remedy from the trial court, or could have filed timely answers noting their objection. Instead, they chose to violate the rules themselves by filing untimely answers for their clients, and by failing to ensure that separate answers were provided by their clients to each inquiry. The answers provided to specific interrogatories posed to specific appellants that merely referred to a document compiled by appellants, counsel that related to all of the clients, claims were evasive and, therefore, incomplete answers pursuant to Civ.R. 37.

Third, the trial court had no obligation to give appellants, counsel credit for good faith just because they offered an "open file" discovery to counsel for The Blade. In a case with so many plaintiffs and so many separate claims, an "open file" offer could be meaningless, as the recipient of the offer would have to expend a great deal more time and energy than would the party making the offer, in order to learn the answers to its questions. The trial court was in the best position to judge whether appellants' counsel were acting in good faith and was not unjustified in concluding they were not.

We note the trial court in this case gave appellants' counsel ample opportunity to avoid sanctions. The trial judge first urged the parties to reach an amicable resolution to the dispute. When the parties could not reach an amicable resolution, the trial judge held an oral hearing on the motion to compel where both parties had full opportunity to argue their positions. When the trial court filed a judgment entry granting the motion, it specifically gave appellants' counsel ten days to file written arguments regarding why sanctions should not be granted in this case. The trial court also had The Blade submit proof of actual fees and costs before the final amount was set at $18,981.50 to be paid by plaintiffs, counsel with no contribution from outside sources, including their clients.

Finally, the sanction order was incorporated into the trial court's final opinion and judgment entry. The trial court noted that it had imposed the sanction in an earlier judgment entry and said: "Parenthetically, it is noted that payment of this fine was due on or before June 1, 1992 and *** it has not been paid as of this writing. For the record, the appropriateness of that earlier fine is emphatically reiterated ***." Accordingly, appellants, fifth assignment of error is not well-taken.

In support of their second assignment of error, appellants argue the trial court erred when it excluded the testimony of two of their experts: Prosanta K. Saha, and David Jamison. Appellants say: "In cases such as these dealing with defamation constructed from 'loaded words, 'juxtaposition and sequence of ideal and

repetition of phrases, a linguistics expert can assist jurors some of whom may not have strong English backgrounds."

The record shows that Prosanta K. Saha is an Associate Professor of Linguistics and Literature at Case Western Reserve University and is a consultant for Webster's New World Dictionary. He has testified in several cases as a linguistics expert and has testified in one other defamation case.

David Jamison is a Professor of Communications at the University of Akron and is a licensed attorney in the state of Ohio. He previously testified in other cases as a journalism expert.

On January 11, 1993, The Blade filed a motion to strike the testimony, reports and affidavits of the two witnesses in question. The Blade argued six bases in support of its motion to strike:

> "(1) neither of these witnesses qualifies as an expert as required under Evidence Rule 702; (2) Saha's testimony, and to a large extent that of Jamison, is irrelevant and improper because it addresses a matter of law reserved for the Court whether the articles are susceptible of a defamatory construction; (3) their testimony would not meet the mandate of Rule 702 that expert testimony 'assist the trier of fact, because a jury would not require expert assistance to evaluate the content and import of the

> straightforward, nontechnical articles at issue and because the testimony of neither expert is relevant to the 'actual malice' inquiry; (4) the opinion testimony of both Saha and Jamison is inadmissible under evidence Rules 703 and 705 because plaintiffs, counsel presented Saha and Jamison with inaccurate and incomplete versions of the facts known to the reporters at the time the articles were written and published; (5) because their testimony would not assist the trier of fact and is based on incomplete or inaccurate information, the testimony of these two witnesses is irrelevant and, therefore, inadmissible under Evidence Rule 402; and (6) even if their testimony were relevant, it must be stricken under Evidence Rule 403 on the grounds that it confuses the issues and is likely to mislead the trier of fact."

Appellants filed a memo in opposition to the motion to strike, and The Blade filed a reply to the memo.

On February 23, 1993, the trial court filed a judgment entry in which it said:

> "The defendants have filed their Motion to Strike the Testimony, Reports, and Affidavits of Plaintiffs, Experts, Prosanta K. Saha and David L. Jamison. The Court has reviewed the Motion and finds it well-taken. Accordingly, it is
>
> ORDERED that the Testimony, Report, and Affidavit of Plaintiffs' Expert, Prosanta K.

> Saha, be, and it hereby is stricken from record of this case. It is further
>
> ORDERED that the Testimony, Report, and Affidavit of Plaintiffs, Expert, David L. Jamison be, and it hereby is, stricken from record of this case."

The Blade filed a motion to supplement the record on appeal with a transcript of the trial court's February 23, 1993 oral ruling. We granted the motion on February 9, 1998. The content of the transcript shows that the trial judge orally explained the basis of his ruling granting the motion to strike. In his remarks, the trial judge indicated that neither of the witnesses in question would qualify as an expert pursuant to Evid. R. 702. He also indicated that even if the witnesses could qualify as experts, their opinions were unreliable because they had not been provided with a fair cross section of the record.

Finally, he indicated that the opinions presented by the witnesses on ultimate issues of law, such as whether a statement is defamatory, were not needed, as he was able to make those rulings himself. [2]

A trial court's ruling granting or denying a motion to strike will only he reversed by an appellate court for an abuse of discretion. *Riley v. Langer* (1994), 95 Ohio

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2 The trial court later quoted portions of its remarks in a footnote of its opinion and judgment entry in which it granted summary judgment to the Blade.

App.3d 151, 157. Likewise, a trial court's "ruling concerning the admission of expert testimony is within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion." *Scott v. Yates* (1994), 1 Ohio St. 3d 219, 221.

The Supreme Curt of Ohio has noted that a trial court is empowered, pursuant to Evid. R. 104 (A), to make a "threshold determination" concerning an expert witness's qualifications to testify. *Id.* Our review of the record shows that the trial court did not abuse his discretion when it ruled that neither of appellants' witnesses qualified as experts.

At the beginning of the depositions for both witnesses,[3] counsel for the Blade asked for a clarification of the areas appellants expected the court to accept as the areas of expertise for each witness. Regarding Professor Saha, appellants' counsel replied: "Psycholinguistics, meaning of words and the impact those words have on the listener." Regarding Professor Jamison, appellants' counsel said:

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3 The depositions included in the record for these two individuals, and for several other witnesses, were not properly filed, pursuant to Civ. R. 30. However, the trial court clearly considered the depositions in question, and no objection was raised in that court or in this court regarding the use of the depositions. Because they have been included in the record on appeal, and because neither party has raised any objection regarding their inclusion, we will consider the contents of the depositions. See, *e.g., Bowmer v. Dettelbach* (1996), 109 Ohio App. 3d 680, 684; *Boydston v. Norfolk Southern Corp.* (1991), 73 Ohio App. 3d 727, at n.2; and *Gaumont v. Emery Air Freight Corp.* (1989), 61 Ohio App. 3d 277, 287.

> "Well we intend to offer Mr. Jamison as an expert in the field of journalism and the propriety of journalistic writing and whether or not the undertaking of Messrs. Murray and Roe and The Toledo Blade Company were within the appropriate standards of journalistic ethics and whether or not the writing reaches the level of intentional falsehood or reckless disregard of the truth."

Professor Saha acknowledged repeatedly that Psycholinguistics is an emerging area of study that is not yet fully accepted as valid by fellow linguists. He and Professor Jamison both acknowledged that they had never studied journalism, did not teach journalism and were not themselves journalists. The trial court did not err in concluding that neither witness was qualified as an expert in the areas for which they were offered by appellants.

In addition, the record shows that the trial court was correct when it concluded that even if the professors were qualified experts, their opinions were unreliable because they were not provided with adequate records to study. Neither witness had seen the actual internal affairs files used by the reporters. Professor Saha was provided with photo copies of single articles, rather than with the actual newspapers where the articles appeared. As a result, he had mistaken impressions regarding the placement of some articles and headlines information he relied upon in opining that false or defamatory impressions were created in the minds of

the average readers of the articles.

Finally, we agree with the trial court that an expert witness should not be allowed to testify about their interpretation of the law, "as that is within the sole province of the court." *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 19. The question of whether a publication is defamatory, *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369,372, or is published with actual malice, *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, 685, is a question of law. The trial court did not abuse its discretion when it excluded the testimony of the witnesses in question. Appellants' second assignment of error is not well taken.

> The remaining three assignments of error presented by appellants all relate to whether the trial court erred when it granted The Blade a summary judgment on appellants' claims for defamation and/or invasion of privacy. when deciding whether a summary judgment is warranted, all Ohio courts are governed by the provisions of Civ.R. 56(C) which state, in pertinent part:
>
> "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as

> to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

Keeping this standard in mind, we have carefully reviewed the record and have considered the arguments presented by the parties.

In the text of their first assignment of error, appellants allege that the trial court failed to accept all their evidence as true and failed to draw inferences in their favor as required by Civ.R. 56. However, the argument they present in their brief in support of this assignment of error fails to give any examples of when the trial court failed to accept their evidence as true, or failed to draw inferences in their favor. Instead, they state that The Blade "argued below that a plaintiff in a defamation action should bear a special burden of defeating a Motion for Summary Judgment to prevent a possible chilling effect on the freedom of expressions. The U.S. Supreme Court has rejected this suggestion. Appellants then cite and discuss two cases they

represent as supporting their contention that no greater burden is placed on a party opposing summary judgment in a defamation case than is placed on a party opposing summary judgment in any type of case.

App.R. 12(A)(2) provides:

> "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

Appellants failed to identify in the record the error on which their assignment of error is based. Appellants' general statements about the standard for summary judgment in a defamation case are of little benefit when they are not accompanied with a discussion of how the trial allegedly strayed from applying the correct burden on appellants when it granted summary judgment in this case. Because appellants have not sufficiently identified any basis in the record to support the allegation they make in their first assignment of error, we will disregard this assignment of error. Appellants' first assignment of error is not well-taken.

In support of their third assignment of error, seven appellants argue that the trial court erred when it granted The Blade summary judgment on their defamation claims. The arguments relating to each of the seven appellants will be considered separately.

However, the law that applies to each of the claims in question is the same. Accordingly, before we separately review the facts of the individual claims for defamation, we begin by reviewing the rules of law relating to a defamation claim.

Ohio courts have repeatedly defined defamation as:

> "a false and malicious publication against an individual made with an intent to injure his reputation or to expose him to public hatred, contempt, ridicule, shame, or disgrace or to affect him injuriously in his trade, business or profession. It is defamatory, and actionable at law, if as a proximate consequence of the libel the individual against whom it is published occasions a pecuniary loss." *Robb v. Lincoln Publishing (Ohio), Inc.* (1996), 114 Ohio App.3d 595, 616.

A court must decide as a matter of law whether a statement is defamatory. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372. When making this legal determination, the trial court must "review the statement under the totality of the circumstances." *Mendise v. Plain Dealer Publishing Co.* (1990), 69 Ohio App.3d 721, 726. The trial court must read the statements at issue "in the context of the entire article" in order to determine "whether a reader would interpret them as defamatory." *Id.* at 726.

When a defamatory statement is made about a public official, the public official must prove an additional element by clear and convincing evidence. The additional element that the public official must prove is that the publisher of the defamatory statement acted with actual malice. *Waterson v. Cleveland State Univ.* (1994), 93 Ohio App.3d 792, 797 (citing *Gertz v.Robert Welch, Inc.* (1974), 418 U.S. 323). To prove that a party acted with actual malice, the plaintiff must show that the party who published the defamatory statement did so "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280. Further, the United States Supreme Court has stated: "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, 685.

The Supreme Court of Ohio has noted that: "The United States Supreme Court has repeatedly recognized that police officers are public officials." *Soke v. The Plain Dealer* (1994), 69 Ohio St.3d 395, 397. In addition, the Supreme Court of Ohio has noted that the United States Supreme Court has ruled "that the Constitution protects statements made about public officials when those statements concern 'anything which might touch on an official's fitness for office ***.'" *Id.* at 397 (quoting *Garrison v. Louisiana* (1964), 379 U.S. 64, 77). No dispute exists in this case that the rules relating to public officials in a defamation case are

applicable to appellants. Each of the appellants who assert they were defamed are police officers, and the articles published about them related to their performance on the job or to their fitness for duty.

Ohio also recognizes defenses to a claim for defamation. One recognized defense is the "innocent construction rule". Under the innocent construction rule, "if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted." *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 372.

A second defense is a claim for a statutory privilege for reporting summaries of official records. A party claiming this defense will win if it demonstrates that the report was "substantially accurate." *Oney v. Allen* (1988), 39 Ohio St.3d 103, paragraph two of the syllabus. A report is substantially accurate "if it conveys the essence of the official record to the ordinary reader, without misleading the reader by the inclusion of inaccurate extra-record information or the exclusion of relevant information in the record." *Id.* at 103, paragraph three of the syllabus. A trial court can grant summary judgment if it concludes that the innocent construction rule applies to allegedly defamatory statements. See *Mendise v. Plain Dealer Publishing Co.*, 69 Ohio App.3d at 726.

Finally, a defendant who can prove the truth of the allegedly defamatory statement has an absolute

defense. *Shifflet v. Thomson Newspapers* (Ohio), Inc. (1982), 69 Ohio St.2d 179, 183. When a defendant is able to demonstrate the truth of the allegedly defamatory statement, summary judgment can properly be granted. *Strickland v. Tower City Management Corp.* (Dec. 24, 1997), Cuyahoga App. No. 71839, unreported. Keeping all these standards in mind, we now turn to the individual claims for defamation presented by appellants.

Appellant Mary Ann Hodak claims that she was defamed by The Blade by two statements in a June 24, 1990 article and by the headlines, a photograph and several statements in a June 28, 1990 article. Appellant Hodak argues that specific statements in the articles in question, along with headlines, pictures, captions, and key findings highlighted in a box near the second article created defamatory implications relating to her. She argues that a reasonable reader would conclude that she was guilty of neglect of duty and that she had made bad decisions. She argues that those implications are false, and that she provided clear and convincing evidence that The Blade published the statements with a high degree of awareness that they were probably false. She argues that she provided proof that The Blade acted with actual malice when it published the statements.

The June 24, 1990 article was an editorial opinion piece that was published in a different section of the paper than the actual series of .investigative reports. The article described the genesis of the project and

contained two statements that many appellants assert defamed them.

The two statements in question were:

1) "The most challenging aspect of this series is its subject matter: brutality, sexual attacks, child molestation, misjudgments that ended in death, drug and alcohol abuse by public servants, misplaced values, and the corruption of systems meant to protect us." John Nichols, 'Secret Files' became 7-month exploration of police misconduct, *The Blade*, June 24, 1990, at E5.

And 2) "Roe adds 'We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases.'" *Id.*

Appellant Hodak contends that the reference in the first statement to misjudgments that ended in death and the reference in the second statement to neglect of duty defamed her.

We agree with the trial court that these two statements do not constitute defamation of appellant Hodak. The statements are not "of and concerning" any one individual. In addition, the statements were part of

an editorial article. As the Supreme Court of Ohio has noted, "'[d]ifferent types of writing have widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion. *Scott v. The News-Herald* (1986), 25 Ohio St. 3d 243, 253, quoting *Ollman v. Evans* (C.A.D.C. 1984), 750 F. 2d 970, 979. Finally, because the article was published several days before any article referring to appellant Hodak appeared, and because the statements do not refer to any one individual, we agree with the trial court that the reasonable reader would not make any connection between these statements and appellant Hodak.

We next consider the second article which appellant argues contained defamatory implications. The June 28, 1990 article, titled "Errors of judgment that end in tragedy", reported the events that led to the death of David Plenzler ("David"), and appellant Hodak's part in those events. The article began on the front page of the paper and continued on page six. Just above the article's headline was a picture of David's dead body with the caption: "Body of stabbing victim David Plenzler, morning after police were called to his home." The following facts were reported in the article.

A downstairs neighbor called the Toledo Police to report fighting in the upstairs apartment, and that "the guy" (who turned out to be David) kept saying "You killed me!" The officer who took the call did not think it was an emergency, so no police units were sent to the scene for the next six minutes.

When appellant Hodak, her partner, and a rookie trainee, were sent to the scene, they were told the complaint was "disorderly-conduct/men fighting", so "they did not suspect that someone inside had been seriously hurt." Dave Murray and Sam Roe, "Errors of judgment that end in tragedy," *The Blade*, June 28, 1990, at 6. Appellant Hodak, her partner and the rookie trainee all went into the apartment, where they saw David lying on his side on the living room floor. His wife said he had been fighting at a bar, and that he was drunk. Appellant Hodak and her partner both saw two spots of blood on the floor. when appellant Hodak's partner kicked David's foot, he raised his head and then lowered it in response. Appellant Hodak knelt down by David's head. She heard snoring and smelled alcohol on his breath. The investigation ended there, and the officers left. They had been at the apartment for six minutes.

The next morning, a relative discovered David was dead. His body was discovered on the living room floor. Underneath his body was a large blood stain and a serrated steak knife. His wife was arrested for his murder. She pleaded guilty to involuntary manslaughter. She received a sentence of three to ten years in prison.

Internal affairs did an investigation and "concluded that the officers involved had not done their jobs properly" *Id.* Chief of Police Marti Felker suspended appellant Hodak and her partner for ten days for neglect of duty. The suspension order was overturned

by the Toledo Civil Service Commission.

The Blade quoted Chief Marti Felker as saying he ordered the ten day suspension of the officers after deciding the way they handled the call constituted neglect of duty. However, he did not believe their neglect of duty was the direct cause of David's death. The Blade then quoted David's mother, who said she did not agree with that conclusion. She felt the officers should have been punished. She said her son was not snoring, he was gurgling death.

The Blade also quoted remarks made by the chairman of the Toledo Civil Service Commission when the commission held a hearing on the officers' appeal from their suspensions. The commission chairman said the officers, examination of David could be considered "cursory" and that further examination might have been in order. Nevertheless, The Blade reported, the commission unanimously dismissed the charges after ruling there was not enough evidence at the scene to alert the officers a crime had just been committed. The Blade further reported that appellant Hodak and the other officers involved in the case had declined comment.

Appellant Hodak does not dispute any of the facts recounted. Instead, appellant Hodak takes issue with how some of the facts were reported. For instance, she lists several statements she objects to, which are:(1) "A subsequent Internal Affairs investigation concluded that the officers involved had not done their jobs

properly." *Id.* As 1; (2) "Indeed, when it comes to police work, neglect of duty can be fatal." *Id.*; (3)"Or, in the death of Mr. Plenzler, a police operator doesn't recognize a potential emergency, and two officers fail to discover a man has been mortally stabbed." *Id.; (4)*"The 'death of David Plenzler involved several officers making several bad decisions, but sometimes all it takes is one cop making one bad decision for someone to die." *Id.* at 6; and (5) "The next morning, on March 2, 1988, a relative discovered Mr. Plenzler's body, still on the living room floor, the carpet underneath caked with dried blood. *Id.* at 1.

We have reviewed the entire article, the surrounding headlines, pictures, captions, and graphics, and agree with the trial court that none of these statements, when viewed in context, constitute defamation. As the trial court stated: "a thorough and reasonable reading of the article does not convey the impression that Ms. Hodak, by neglecting her duties as a police officer, caused Mr. Plenzler's death." Indeed, as we previously noted, the article contained the information that she was cleared of neglect of duty charges, and that the Chief of Police and the chairman of the Toledo Civil Service Commission both said the actions of the officers did not cause David's death.

We further find that the statements are not defamatory for these additional reasons. Several of the statements which appellant Hodak complains of are truthful. Internal affairs did conclude the officers had not done their jobs properly, because it charged them

with neglect of duty. The statement that neglect of duty by a police officer can be fatal is a true statement. The statement that two police officers failed to discover that David was fatally stabbed is also true. One statement, that several officers made bad decisions in David's case, is a protected statement of opinion. See *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 283; and *Scott v. News-Herald* (1986), 25 Ohio St.3d 243, 250 (court can determine as a matter of law that a statement is opinion, not fact, and is-not defamatory). As the trial court noted, while appellant Hodak and her partner were cleared of neglect of duty charges, persons could still legitimately form an opinion that they made some bad choices in how they handled the call. Finally, it is a true statement that David's body was still on the living room floor when it was found.

Therefore, we agree with the conclusions of the trial court that these statements were not defamatory, that there is no proof that the statements were published with actual malice, that the statements taken from public records are substantially accurate and that the statements in the photo caption qualify for the innocent construction rule. The trial court did not err when it granted The Blade a summary judgment on appellant Hodak's claim for defamation.

Appellant George Taylor argues that The Blade defamed him in the June 24,1990 opinion editorial article and in headlines, statements and pictures relating to three June 25, 1990 articles. The June 24, 1990 opinion editorial article is the same one

complained of by appellant Hodak. The two statements complained of by appellant Taylor are:

1) "Roe adds 'We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases.'" John Nichols, 'Secret Files' became 7-month exploration of police misconduct, *The Blade*, June 24, 1990, at E5.

and 2) "Once they had done this, the pair set out to recreate key incidents, talking with persons associated with those cases: the officers, their commanders, victims, and bystanders." *Id.*

Once again, we agree with the trial court that because these statements are not "of and concerning" any one individual, they are not defamatory. Even though appellant Taylor showed that the reporters in question never talked with him to prepare their stories, no defamation exists in their saying officers and their commanders were contacted in preparation for this series, as the record shows the reporters did talk with several officers and commanders.

We now turn to the June 25, 1990 articles. The first article, which was on the front page of the paper was entitled "Police Violence: a costly, recurring problem

for city." A thorough reading of the article shows that it never refers to appellant Taylor. The second article, which appeared on pages six and seven of the front section of the paper was titled: "Brutality? You Decide: A costly, recurring, and painful problem." Again, a thorough reading of the article reveals no reference to appellant Taylor. The third article, appeared on page seven in a shaded box at the bottom of the page denoted: "Other key cases." The title of the third article was "Role reversal: A repeat victim." A picture or appellant Taylor and of two x-rays showing the broken arm of Campbell Reasonover accompanied the article.

The article contained the following information. Campbell Reasonover ("Reasonover") "was repeatedly beaten up by cops." Role reversal: A repeat victim, The Blade, June 25, 1990, at 7. In the first incident, Reasonover resisted three officers who arrived at his house to arrest him on an outstanding warrant. He said the officers beat him with their night sticks, and he had to get forty-four stitches in his head.

A second incident occurred five years later. Reasonover told officers who were investigating an incident to get out of his yard.- He then went back into his house after exchanging words. According to The Blade:

> "A steamed Officer George Taylor, Jr., kicked in the back door, cutting his leg, and grabbed Mr. Reasonover in the kitchen.

> "The officer twisted Mr. Reasonover's arm behind his back, slipping his nightstick between the man's arm and back. Using it as a lever, he pushed and pushed.
>
> "Then *snap*. Mr. Reasonover's arm broke. And no wonder. At the time, Mr. Reasonover was 67 years old. He sued the city, settling out of court for $25,000.
>
> "Mr. Reasonover did not complain to Internal Affairs, so Officer Taylor, a second-year veteran, was never investigated. He is still a Toledo police officer." *Id.*

Appellant Taylor complains about the use of the term "steamed" to describe his demeanor when he entered Reasonover's house. He says The Blade knew this was a false characterization. He also contends that he did not break Mr. Reasonover's arm, his female partner did. He says The Blade had "no document nor eyewitness that identified [him] as the person breaking Mr. Reasonover's arm."

The documents in the record, including depositions and trial testimony from the lawsuit Reasonover filed after his arm was broken., show that two different versions did exist regarding who was responsible for breaking Reasonover's arm. Appellant Taylor and his partner both testified that she broke Reasonover's arm. In contrast, Reasonover and his wife, who was present when the events occurred, testified that appellant

Taylor used a police baton to break Reasonover's arm. We agree with the trial court's conclusion that the reporter who prepared this story "arguably strayed from prudent and fair journalistic standards by failing to contact Taylor for his version of the events surrounding the Reasonover incident and by failing to examine certain court documents which may have called into question the accuracy of the sources of information he did consult ***." However, we also agree with the trial court that this can at best be considered negligence, a standard that does not meet the level required for actual malice.

We also agree with the trial court that the case relied
upon by appellant Taylor for the assertion that failure to investigate is actual malice, *Harte-Hanks, Inc. v. Connaughton* (1989), 491 U.S. 657, is distinguishable. In that case, the evidence showed reporters had reason to doubt their story and purposely chose not to interview witnesses who could refute the allegations they printed. *Id.* at 692. The court in-that case specifically noted: "Although failure to investigate will not alone support a finding of actual malice *** the purposeful avoidance of the truth is in a different category." *Id.* (citations omitted).

The record shows that the reporter in this case did not entertain any serious doubts about the truth of the information he included in his article. He testified that his starting point for information was a copy of the request for action filed by the law department of the

city of Toledo, seeking approval of a settlement in the lawsuit filed by Reasonover. The request for action read, in pertinent part:

> "Upon the police's investigation onto the Reasonover property, Mr. Reasonover, who had been drinking, emerged from the house using profanity and demanding that the police get off his property. A verbal altercation ensued, whereupon Mr. Reasonover went back into his house with Officer Taylor in pursuit with the intent of effectuating an arrest for Disorderly Conduct. Officer Taylor kicked the back glass door to gain entry and thereupon sustained approximately 7 stitches to his leg. Once inside the house, Mr. Reasonover's right arm was broken in an attempt to arrest him. Mr. Reasonover was age 67 at the time of the incident."

The reporter interpreted the statements in the above quote to mean that appellant Taylor broke Reasonover's arm. His interviews with three members of the Reasonover family reinforced his belief. Reasonover's grandson specifically told the reporter that the male officer broke Reasonover's arm. Finally, during his review of the court documents relating to Reasonover's lawsuit, he did not find any information that alerted him that there was any dispute about who broke Mr. Reasonover's arm. Accordingly, there is no evidence that the reporter published his statements with knowledge they were false or with reckless

disregard regarding whether they were false.

We are also unpersuaded that the use of the word "steamed" to describe appellant Taylor when he entered the Reasonover house is defamatory. Appellant Taylor alleges that the word "steamed" "removes the story from being a possible accidental injury during an appropriate arrest," and results in the accusation that appellant Taylor engaged in police brutality regarding the Reasonover case. As the trial court noted, the common meaning of "steamed" is that the person is angry. Even if appellant Taylor was angry when he entered the Reasonover house, it does not follow that he did not act professionally when he participated in Reasonover's arrest or that Reasonover's arm was intentionally broken. Furthermore, as the trial court noted, the use of the word "steamed" does not show the reporter knew appellant Taylor did not break Reasonover's arm or that he doubted whether appellant Taylor broke Reasonover's arm. Because there is no evidence of actual malice, the trial court did not err when it granted The Blade summary judgment on appellant Taylor's claim for defamation.

Appellant John P. Smith contends that The Blade defamed him in the June 24, 1995 editorial opinion article, and in the June 25, 1990 article entitled "Police Violence: a costly, recurring problem for city." He alleges that the defamation consists of an assertion that he committed police brutality.

The statement in the June 24, 1995 article to which

appellant Smith objects, is:

> "Roe adds, 'We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases.'" John Nichols, '*Secret Files*' became 7-month exploration of police misconduct, *The Blade*, June 24, 1990, at E5.

Once again, we agree with the trial court that this statement did not defame appellant Smith because it is not "of and concerning" any one person. Nothing in the statement refers to appellant Smith. Furthermore, pursuant to the innocent construction rule, the statement can be interpreted as listing some examples of the types of cases the reporters reviewed, rather than an exhaustive list. Finally, when the statement in this article is read in context of the entire series, it is not defamatory.

Appellant Smith also contends that he was defamed by the headline of the June 25, 1990 article that read: "*Police Violence: a costly, recurring problem for city*." In addition, he points to the following statement in that article as evidence of defamation: "But Ms. Henneman claims in her suit that officer Smith dragged her from the house and down the front porch onto the icy yard, where he used violent and excessive force on the plaintiff, including blows to the head, arms, legs, and body with a nightstick.'" Dave Murray and Sam Roe,

"Police Violence: a costly, recurring problem for city", The Blade, June 25, 1990, at Page 6. Appellant Smith contends that The Blade knew the allegation was false, because civil juries found Ms. Henneman's allegations unfounded on two separate occasions. He argues that The Blade had an obligation to men ion that the allegation was determined unfounded.

The statement appellant Smith complains of was included in a discussion of two lawsuits that citizens filed against appellant Smith alleging that he injured them while arresting them. In his deposition, appellant Smith acknowledged the sentence he complains of is an accurate summary of the allegations Ms. Henneman made in the lawsuit she filed against him. He also acknowledged that the first jury verdict rendered in his favor was reversed on appeal, and the case was remanded for further discovery and a new trial. Finally, he acknowledged that the second jury verdict in his favor was not yet in existence when The Blade ran the article with the statement he alleges is defamatory.

Under these circumstances, we agree with the conclusion of the trial court that The Blade has a valid fair reporting privilege defense. We also agree with the trial court that the innocent construction rule can be applied as a valid defense for The Blade in this instance. The sentence can be read as a simple statement of what allegations were made by Ms. Henneman.

In addition, we agree with the trial court that when the whole article is read, no reasonable reader could

believe that Ms. Henneman's allegations were certainly true. The article contained her version of the events, but it also contained the information that internal affairs was unable to find any evidence to support her version of events. The article also contained information showing that appellant Smith contended any injury inflicted on Ms. Henneman was accidental, and that he could not comment to the reporters because the suit was still pending. Therefore, the trial court did not err when it ruled that the statements were not defamatory as a matter of law.

Finally, we agree with the trial court that appellant Smith has not presented evidence to show with convincing clarity that The Blade acted with actual malice when it initially reported on the lawsuit filed by Ms. Henneman against him or when it reprinted the article as part of a reprint of the series that was distributed at a reporter's conference in Detroit, Michigan. The reporter who researched and primarily wrote the story testified that he did not mention the first jury verdict in appellant Smith's favor because his research showed the finding in appellant Smith's favor was reversed on appeal. He concluded that the first jury verdict was a nullity.

He did not mention the second jury verdict in appellant Smith's favor, because, as we have already noted, the verdict did not exist when the article was initially published. He did not learn of the second jury verdict before the reprint of the article was distributed, even though another reporter from The Blade wrote an

article about the second jury verdict. As the trial court correctly noted, the Supreme Court of Ohio has followed the ruling of the United States Supreme Court "that the mere presence of conflicting stories in a defendant's own files does not establish that the defendant knew that the ad was false, 'since the state of mind required for actual malice would have to be brought home to the persons in *** [the defendant's] organization having responsible for the publication ***'" of the information. *Varanese v. Gall* (1988), 3S Ohio St.3d (quoting *New York Times Co. v. Sullivan* (1964), 376 U.S. 254,287). Therefore, in this case, the evidence shows that the reporter responsible for the reprint of the article did not act with actual malice when he failed to include the information in the reprinted article about the second jury verdict. Because there is no evidence of actual malice, and because other valid defenses we previously discussed applied to appellant Smith's claim of defamation, the trial court did not err when it granted The Blade summary judgment on appellant Smith's claim.

Appellant Martin Schaber bases his claim for defamation on three headlines published on June 24, 1990, along with two headlines, a "key finding," and statements made in an article published on June 25, 1990. The three headlines published on June 24, 1990 about which appellant Schaber complains are: (1) "Secret police files reveal crime, cover-up"; (2) "Two decades of crime and cover-up"; and (3) "Citizens pay the price of police wrongdoing." When the articles accompanying the headlines are read, the reader learns

that the article accompanying the first two headlines never refers to appellant Schaber. The article accompanying the third headline does refer to appellant Schaber. The article contains the following statements relating to him:

> "Take Dane Glassford's case. In January, 1986, Officer Martin Schaber, a 17-year police veteran who served in Vietnam, struck the 22-year-old printing company worker in the jaw with a flashlight after Mr. Glassford threw a snowball at his police car and ran to avoid arrest.
>
> "Mr. Glassford's broken jaw was wired shut. He sued the city for $350,000 but agreed to a $24,000 settlement.
>
> "Internal Affairs didn't learn of the case until May, 1987, when then-Police Chief John Mason read about the settlement in the newspaper, Lieutenant Navarre says.
>
> "Mr. Glassford refused to cooperate with Internal Affairs investigators on the advice of his attorney, Lieutenant Navarre says.
>
> "It is not the law department's job to inform Internal Affairs when a lawsuit is filed, Mr. Rosen says, but his investigators always checked with police investigators to find out if they had any knowledge about the allegations.

> "'If they're saying over there they don't know anything about it, I don't know why,' Mr. Rosen says." Dave Murray and Sam Roe, Citizens pay the price of police wrongdoing, The Blade, June 24, 1990, at D4.

Appellant Schaber alleges that the complained of items from June 24, 1990 create a defamatory implication that he engaged in wrongdoing in regard to the Glassford lawsuit. He concedes the article contains truthful statements. He did hit Glassford with his flashlight. Glassford's jaw was broken. Glassford did file a lawsuit for the injuries he suffered. The city of Toledo did pay Glassford $24,000 in settlement, and internal affairs was not aware of the incident until the chief of police read about the settlement in the newspaper.

We agree with the trial court that when the complained of headlines are read in conjunction with the contents of the article, no reasonable reader would conclude that appellant Schaber was guilty of wrongdoing in regard to the Glassford lawsuit. We also agree with the trial court that even if such an implication could be shown, there is no evidence to show that The Blade acted with actual malice when it published the statements about the Glassford suit.

As we previously noted, appellant Schaber also complains about two headlines, a "key finding" and statements made in an article published on June 25, 1990. The two headlines read: "*Police violence: a costly, recurring problem for city*"; and "Despite IA record, a

good street cop." The "key finding" read: "A handful of Toledo police officers have beaten citizens more than once." The statements cited by appellant Schaber as defamatory in the June 25, 1990 articles were: (1) "Officer Schaber is one of a handful of officers in the Toledo police division who, according to Internal Affairs files, has beaten citizens more than once." Dave Murray and Sam Roe, Police violence: a costly, recurring problem for city, The Blade, June 25, 1990, at 1; and (2) "Like Officer Schaber, many police officers have to use force in their work. But excessive use of force, Internal Affairs files show, is a costly, recurring, and painful problem." *Id.* Appellant Schaber contends that these complained of items, read together, create the defamatory implication that he engaged in wrongdoing and used excessive force.

We agree with the trial court that when the complained of items are read in context, they are not defamatory as a matter of law. Appellant Schaber admits that the city has paid money to settle lawsuits filed by citizens who sued for injuries inflicted upon them by police officers who were acting in their official capacities, and that the lawsuits are a continuing problem. Therefore, the headlines that inform the reader that police violence is a costly, recurring and painful problem are truthful.

He also admits that he did strike two different persons with his flashlight on two separate occasions. He points out, however, that internal affairs files only reflect one incident, since Glassford chose to file a lawsuit and not

to file a complaint with internal affairs. We agree with the trial court that the minor discrepancy of saying "according to internal affairs files" versus "according to an internal affair file and court records" to identify the source of the information that appellant Schaber hit two persons is not defamatory.

Finally, appellant Schaber admits that the article accompanying the headline "Despite IA record, a good street cop" did not defame him. As the Twelfth District Court of Appeals has said:

> "When a claim is made that a newspaper headline or the item to which it is attached are defamatory, they must be construed together in determining the defamatory effect of either. *** If they are false and were published with a malicious intent, they constitute a libel that will support an action for defamation. ***" *Robb v. Lincoln Publishing (Ohio), Inc.* (1996), 114 Ohio App.3d 595, 617.

We find that the headline in question is subject to the innocent construction rule, because it can be interpreted as simply meaning that appellant Schaber is a good street cop even though he has an internal affairs record. We further find that even if the headline was not subject to the innocent construction rule, when it is read in context with the accompanying article, it is not defamatory.

The article shows that internal affairs gave a written

reprimand to appellant Schaber for using his flashlight as a nightstick when arresting a citizen; therefore, he has an internal affairs "record". However, the article also contains information showing that appellant Schaber had been shot and injured while he was trying to arrest a suspect, and that he had only been returned to active duty a few weeks before the incident for which he was reprimanded. Appellant Schaber told a lieutenant a short time later that he felt he needed to get off the streets. He transferred to the mounted patrol and had patrolled the downtown streets four years before The Blade published the article and headline now in dispute. Finally, the article revealed that appellant Schaber has received numerous commendations during his career and is considered a good street cop. Because we agree with the conclusions of the trial court that appellant Schaber was not defamed by The Blade, we find that the trial court did not err when it granted summary judgment to The Blade on appellant Schaber's claim for defamation.

Appellant Robert Case argues that he was defamed by two statements made in the opinion editorial article The Blade published on June 24, 1990. The statements were:

1) "Roe adds 'We pared it down to cases that seemed to affect the community alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases.'" John

Nichols, 'Secret Files', became 7-month exploration of police misconduct, The Blade, June 24, 1990, at E5.

and 2) "Once they had done this, the pair set out to recreate key incidents, talking with persons associated with those cases: the officers, their commanders, victims, and bystanders." *Id.*

As we have discussed in regard to this complaint with previous appellants, we agree with the trial court that because these statements are not "of and concerning" any one individual, they are not defamatory. Even though appellant Case showed that the reporters in question never talked with him to prepare their stories, no defamation exists in their saying officers and their commanders were contacted in preparation for this series, as the record shows the reporters did talk with several officers and commanders. Finally, the statements are subject to the innocent construction rule, as they can be interpreted as examples of the types of cases reviewed and of the types of methods used to develop the special series of articles.

Appellant Case also complains that he was defamed by a headline published on June 25, 1990 on the front page that read: "Police Violence: a costly, recurring problem for city." The article accompanying the headline begins on page one and continues on page six. No mention is made of appellant Case anywhere in the

article. As we previously discussed, a headline must be considered in context. We agree with the trial court that appellant Case was not defamed by the headline in question.

Appellant Case also complains that he was defamed by the information published about him in an article that appeared on page seven in a shaded box at the bottom of the page. The article was denoted: "Other key cases." The information published was:

> "Officer:
>
> "Sgt. Robert Case
>
> "Appointed:
>
> "July 12, 1976
>
> "Date of Incident: Oct. 18, 1984
>
> "Narrative: Sgt. Robert Case takes 70-year old William Eichenlaub to the Lucas County jail to be booked for driving while intoxicated. *While waiting in the booking line, Sergeant Case pulls on the man's left arm, dislocating his elbow, according to a lawsuit* filed against the officer and the city. 'He took the handcuffs off me, but he grabbed my left arm, and he put a hammer lock on me,' *Mr. Eichenlaub now says. 'He just gave my arm a yank up and popped it out of the socket.'* He is taken to St. Vincent Medical

> Center, where he undergoes surgery. Mr. Eichenlaub spends the next nine months recovering.
>
> "Disposition: Mr. Eichenlaub sues for $400,000. On March 8, 1988, the city settles out of court for $10,696 - Mr. Eichenlaub's final medical bill.
>
> "Footnote: Internal Affairs records show the unit never investigated the incident. Sergeant Case is still on the force." Other key cases", The Blade, June 25, 1990, at 7 (emphasis added).

Appellant Case argues that the statements that he dislocated Eichenlaub's elbow were false, and that The Blade acted with actual malice when it printed the statements. He says the reporters would have had reason to doubt the truth of the allegations made by Eichenlaub if they had read Eichenlaub's own deposition testimony in the civil lawsuit that was settled. Eichenlaub admitted in his deposition that he did not think appellant Case meant to hurt him. He also admitted that he told a bank teller that he hurt his arm in a car accident that was the basis for appellant Case putting him under arrest.

We agree with the trial court that The Blade has several valid defenses to appellant Case's claim that he was defamed. First, the fair report privilege applies. The statements in the article about which appellant Case complains were accurate summaries of the allegations made by Eichenlaub in the civil suit he filed for his

injuries and his expansion on the meaning of his allegations. See *Ratliff v. McGlamery* (Nov. 23, 1988), Lorain App. No. 4387, unreported.

Second, there is no evidence that The Blade acted with actual malice when it published the statements. The reporter who wrote the article testified that he had no intent to imply that appellant Case used excessive force. Furthermore, he testified he had not seen Eichenlaub's deposition. The items he did see, including the complaint and the request for jury instructions, along with his interview of Eichenlaub were all consistent that Eichenlaub alleged that appellant Case dislocated his elbow. As we have previously discussed, the failure to review all available sources may be considered poor journalism or negligence, but those standards do not meet the standard required to show actual malice. See *Harte-Hanks. Inc. v. Connaughton*, 491 U.S. at 692. The trial court did not err when it granted The Blade summary judgment on appellant Case's claim for defamation.

Appellant Michael Early contends that he was defamed by an implication that he had been drinking alcohol before he became involved in an incident while off duty in which he shot a citizen. He says the implication is created by a combination of headlines and articles published as part of the series.

He first points to a headline and two statements published on June 24, 1990, along with a statement from a television advertisement as the defamatory

statements. The headline, published on page five of section E in the paper on June 24, 1990 read: "'Secret Files, became 7-month exploration of police misconduct." The headline accompanied the editorial opinion piece written by John Nichols which several other appellants have complained of as defaming them.

Appellant Early objects to two statements in the article. The statements are:

> "Roe adds 'We pared it down to cases that seemed to affect the community - alcohol cases where officers were carrying guns, repeated brutality offenders, domestic violence cases that turned into public brawls, neglect of duty cases.'" John Nichols, Secret Files' became 7-month exploration of police misconduct, The Blade, June 24, 1990, at E5.

and "'We went out and interviewed victims of police misconduct,' Roe says." *Id.*

The statement from the television commercial to which appellant Early objects was: "It is inconceivable that this kind of Toledo Police misconduct has been hidden from view for seventeen years."

As we have previously discussed, we agree with the trial court that the headline and statements in the editorial opinion article were not defamatory. The statements are subject to the innocent construction rule, because they can be read as a sampling of the

types of cases reviewed by the reporters. In addition, the statements do not defame appellant Early, because they are not "of and concerning" any one individual. These same reasons apply to the complained of line in the television advertisement.

Appellant Early next points to: a statement published on June 28, 1990 on page six of The Blade; two headlines published on June 29, 1990; a recap statement published June 30, 1990; and a statement published on July 1, 1990. He argues that these items taken together defame him.

The June 28, 1990 statement appears in a small shaded box in the far right column of page six, and reads:

> "YESTERDAY:
>
> "Domestic violence among married and dating police officers is cause for public concern.
>
> "TOMORROW:
>
> "Internal Affairs files and other records reveal numerous instances in which officers have used their guns not to protect the public good but to undermine it.
>
> "And although the cases vary, there is a startling common denominator. The officers are invariably off duty and drinking alcohol.

> "While drinking, off-duty officers have used their guns to kill and injure innocent people, put bystanders at risk, and threaten people in their personal lives."

The first headline from June 29, 1990 that appellant Early complains of appeared on the first page and read: "Armed and dangerous: When firearms and alcohol combine, the result may prove deadly." The article accompanying that headline continued on page six, where a second headline was printed to accompany the article. The second headline read: "Armed and loaded: guns, alcohol: a deadly mix". Appellant Early is never referred to in the article that starts on page one, continues on page six, and is accompanied by the complained of headlines. The article that does refer to appellant Early is headlined: "Since 1985, a third of police gunfire ruled accidental." The article accompanying the headline contained the following information regarding appellant Early :

> "In recent years, many shots ruled accidental have also injured citizens.
>
> "For example, in March, 1987, Officer Michael Early, off duty and not in uniform, intervened in a traffic dispute at the intersection of Upton and Central avenues. When Officer Early walked in front of a car driven by David Stalma, the car bumped him. The officer went to the open driver's side door and reached in to turn off the ignition. But the car drove off with him hanging

on.

"The officer, Internal Affairs investigators later concluded, was not carrying his police badge, and Mr. Stalma and his brother, Gary, a passenger, were not convinced he was a policeman.

"The officer had his gun drawn during the precarious ride, and a shot was fired during a struggle, hitting 21-year-old Gary Stalma in the chest. Mr. Stalma was admitted to Toledo Hospital in serious condition.

"The officer told investigators that he had his finger on the trigger and that the gun went off when the Stalmas pulled on the gun and he pulled back.

"The firearms review board ruled the shooting accidental and ordered Officer Early to receive additional weapons training.

"Deputy Chief Jackson says officers should be required to go to the shooting range several times a year to practice shooting and handling their guns. Now, there is no required practice.

"And practice, he says, is now imperative as the division switches from .38 revolvers to 9mm semiautomatic handguns.

"'Once you press that trigger,' Deputy Chief

> Jackson says, the next shot is just a touch of that trigger. Boom! Boom! Boom! Boom!'
>
> "Had Officer Early fired a semiautomatic gun in the 1987 traffic dispute, 'he could have pulled off four or five more rounds into that car,' Deputy Chief Jackson says." Sam Roe and Dave Murray, Since 1985, a third of police gunfire ruled accidental, The Blade, June 29, 1990, at 6.

Appellant Early does not dispute the truth of any of these statements.

Instead, appellant Early points to two additional statements that he says further contributed to the false impression that he was drinking alcohol before intervening in the traffic dispute and accidentally firing his gun. The first of the two additional statements was published on June 30, 1990 on page six. It appeared in a small, shaded box in the far right column of page six. The statements in the shaded box were:

> "YESTERDAY
>
> "Drinking *by armed off-duty officers - a violation of state law - has resulted in one killing and has threatened the lives of dozens of citizens.*
>
> "TOMORROW
>
> "What can be done about police misconduct in Toledo? There are many possible solutions say

> citizens, law enforcement personnel, and national experts.
>
> "One hotly debated idea is civilian oversight, a system already in place in cities such as Cleveland, Detroit, and Cincinnati.
>
> "Also, a review of the police division's background checks of officer applicants reveals that some recruits had been convicted of drug possession, driving while intoxicated, assault, and disorderly conduct, among other crimes." The Blade, June 30, 1990, at 6 (emphasis added).

Appellant Early objects to the first statement which is underlined in our quote.

The final statements appellant Early objects to were published on July 1, 1990. The statements appeared in a shaded box that covered the bottom quarter of page six. The shaded box is titled: "An overview of the series". The specific statements pointed to by appellant Early were the summary that appeared under the title: "Friday: armed and loaded". The statements were: "Records reveal numerous instances in which officers have used their guns not to protect the public good but to undermine it. While drinking, armed officers have killed and injured innocent citizens and have threatened people in their personal lives."

We have carefully considered all of appellant Early's contentions, and conclude that he is not defamed by any

of the complained of statements. Neither the headlines nor any of the articles accompanying the headlines he complains of referred to appellant Early. Appellant Early is not referred to in the complained of summaries. The one article that does refer to appellant Early makes it clear his off-duty shooting of a citizen was ruled accidental, and nothing in the article would lead a reader to believe he was drinking alcohol before the incident occurred. We agree with the trial court that because the statements cited by appellant Early are not "of and concerning" him; because the statements complained of by appellant Early are subject to the innocent construction rule; because the account in the article referring to appellant Early qualifies for the fair report privilege; and because there is no proof of falsity regarding any of the published statements about appellant Early, appellant Early's claim for defamation must fail as a matter of law. The trial court did not err when it granted The Blade a summary judgment on appellant Early's claim for defamation.

Appellant Robert Barboza is the final appellant to claim he was defamed by The Blade. He admits that he did commit one act of misconduct. However, he complains: "[l]ike Officer Early, the Blade, by headlines, captions, a second article, and other text went far beyond the mere facts of such one time act of drinking on duty. It characterized him as being an alcohol abuser, drinking from the bottle, and unfit to be on the police force or to be selected to join the police department, and as having an association with the Beast."

Appellant Barboza first complains of four items that were published by The Blade on June 30, 1990. The four items are: (1) a key finding listed at the top of page one in a shaded box that read: "While dozens of officers have been caught abusing drugs or alcohol the last two decades, Internal Affairs records show only four have been ordered into treatment programs"; (2) the headline that appears below the key finding box that read: "Drink, drugs: A problem in blue." and a photo of appellant Barboza that appeared below the headline along with the photos of two other officers; (3) a statement that appears in the article under the complained of headline that reads: "Records provide other clues about how the Toledo police division treats its alcohol problem: In the last two decades, according to Internal Affairs documents, only four officers have been ordered into substance-abuse treatment."; and (4) a graphic illustration that appeared on page six showing a shadow figure of an officer in uniform drinking from a bottle. Appellant Barboza says these items, combined, create the defamatory impression that he is an alcohol abuser who needs substance abuse treatment, and that he drinks alcohol straight from a bottle.

Once again, when the complained of items are read in context, it becomes clear they are not defamatory. The key finding is a truthful statement, and does not identify appellant Barboza as one of the officers required to have substance abuse treatment. The contents of the article following the complained of headline show that alcohol and drug abuse does pose a

problem for the police department. Appellant Barboza's picture is printed along with the pictures of two other officers because a brief summary of their cases appears just below the pictures. The summary relating to appellant Barboza reads:

> "Officer: Robert Barboza.
>
> "Incident: Drank on duty and drove patrol car 62 mph down South End residential streets, yelling profanities out the window and racing around corners, tires squealing.
>
> "IA Charge: Intoxication and Conduct Unbecoming an Officer.
>
> "Disposition: 20-day suspension." Dave Murray and Sam Roe, *Drink, drugs: a problem in blue*, The Blade, June 30, 1990, at 1.

Just below the three summaries, the reporters continued the article by posing the question whether the three summarized cases were isolated incidents. They answered their question no and then explained, in the article, that drug and alcohol abuse is often the cause for serious charges filed through internal affairs. They further explained that the problem is not unique to this particular police force. They explained how the problem is dealt with by other forces, and contrasted the other forces, and contrasted the other approaches with the approach applied in Toledo. In that context, they said that records show only four officers had been

required to seek substance abuse treatment. Nothing about the context of that statement would lead the reader to conclude that appellant Barboza had to be one of those four officers.

In addition, nothing about the graphic on page six would lead a reasonable reader to conclude it depicts appellant Barboza. A more expanded version of the events that led to appellant Barboza's twenty day suspension for intoxication on duty and sexual harassment does appear on the same page. However, nothing in the article suggests he was drinking alcohol straight from a bottle. Instead, the article contained the statement: "She told Internal Affairs investigators that, after waiting an hour and a half, she went to get her partner and found him in the backyard, drinking beer near the pool and talking to four men, later identified as off-duty officers ***." Dave Murray and Sam Roe, Drink, drugs: A problem in blue, The Blade, June 30, 1990, at 6. In addition, the balance of the page contains accounts of other officers who were disciplined for actions they took while under the influence of drugs or alcohol and statistical information demonstrating the severity of the problem. Under the innocent construction rule, the graphic can be interpreted as merely representing officers who have substance abuse problems.

Appellant Barboza next complains that The Blade defamed him on July 1, 1990 when it published an article titled: "Past problems, future solutions, Are we hiring the best?" The article contained the following

statements about appellant Barboza:

> "Robert Barboza was hired in 1979 even though a background investigation found he had been arrested three times for drunk and disorderly conduct and once for resisting arrest.
>
> "Five years after joining the force, he was relieved of duty after his partner complained that, while on duty, he had stopped at a police pool party to drink beer, had driven recklessly, and was drunk. Still on the force, he was suspended 20 days." Dave Murray and Sam Roe, "*Past problems, future solutions; are we hiring the best?*", The Blade, July 1, 1990, at 1 and 6.

Appellant Barboza does not contest the truth of the facts reported. Instead, he argues that the report should have been balanced with more facts that are in his favor.

For instance, appellant Barboza believes the article should have contained the information that his drunk and disorderly arrests happened when he was eighteen years old. He thinks the reporters should have revealed that he entered the U.S. Marine Corps and served in the Vietnam War before he was decorated and honorably discharged. He also thinks the report should have included the information that he worked at Champion Spark Plug for ten years without incident before he was hired to be a police officer. He says that because these favorable facts were not reported, The Blade article

created the defamatory impression that he was not fit for service on the police force.

The Supreme Court of Ohio has noted that journalists of necessity make a selection "as to what is newsworthy. The relevant question is whether that selection is made with a view toward dissemination of false information. ***" *Perez v. Scripps-Howard Broadcasting Co.* (1988), 35 Ohio St.3d 215, 220 (citations omitted). In this case, we conclude that the selection of material to be reported about appellant Barboza's background did not result in the reporting of an untruth. Furthermore, to the extent a reader might get the impression that it was the opinion of the reporters that appellant Barboza was not a fit candidate for the police force, the opinion is protected by Section 11, Article I of the Ohio Constitution. See *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 283; see, also, *Scott v. The News-Herald* (1986), 25 Ohio St.3d 243.

Finally, appellant Barboza says The Blade defamed him on June 30, 1990 by Publishing his badge number at the time of the incident for which he was disciplined; and by publishing a statement on June 30, 1990 from a police command officer about the quality of recruits. The badge number assigned to appellant Barboza at the time of the incident in question was 6G6. Appellant Barboza argues that many people associate that number with "The Beast" from the book of Revelations in the Bible. He argues that The Blade meant to imply that he is connected with Satan or with "The Beast" when it

reported his badge number. He stresses that The Blade did not publish the badge number of any other officer, and that he had a new badge number assigned to him by the time the article was published. He says the intent of The Blade is made clear by the statement it published the following day regarding the quality of police recruits.

The statement about the quality of recruits was the following quote: "The kind of people we are recruiting is appalling,' says a police command officer and former recruiter who requested anonymity. 'You look at some of them and say, 'How in the devil did they get here?'" Dave Murray and Sam Roe, "Are we hiring the best?", The Blade, July 1, 1990, at 6. Appellant Barboza places great emphasis on the officer's use of the word "devil" in his quote.

Like the trial court, we find that no reasonable reader would conclude after reading the statements in context that The Blade was asserting that appellant Barboza has a connection to Satan or to "The Beast". We also agree that the innocent construction rule applies. The report of the badge number is completely innocent i.f taken at face value, and the quote from the command officer shows that he has reservations about the quality of some of the recruits. The trial court did not err when it granted summary judgment to The Blade on appellant Barboza's claims for defamation.

Because we have concluded that the trial court did not err when it granted summary judgment to The

Blade on each of the claims for defamation brought by appellants, we find appellants, third assignment of error not well-taken. We now consider appellants, fourth assignment of error in which appellants Kimberly L. Kristoff, Jane Lewis and Linda Leichty contend the trial court erred when it granted summary judgment to The Blade on their claims for invasion of privacy.

Appellants Kimberly L. Kristoff, Jane Lewis and Linda Leichty allege that their presented evidence showing all the elements of their cause of ac on exist in this case. Ohio courts have recognized that five elements must be proved to establish a claim for invasion of privacy by publication of private facts. Those five elements are:

> "(1) There must be publicity; the disclosure of a public nature, not private. 'Publicity', means communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge as opposed to 'publication' as that term of art is used in connection with liability for defamation as meaning any communication by the defendant to a third person.
>
> "(2) The facts disclosed must be those concerning the private life of an individual, not his public life. There is no liability when the defendant merely gives

> further publicity to information about the plaintiff that is already public, such as matters of public record about his birth or marriage date, or matters that the plaintiff leaves open to the public eye, such as kissing his spouse in public.
>
> "(3) The matter publicized must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
>
> "(4) The publication must have been made intentionally, not negligently. ***
>
> "(5) The matter publicized must not be a legitimate concern to the public. A newspaper's publicizing 'legitimate news' ordinarily will not be actionable." *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166-167 (citations omitted).

Keeping these factors in mind, we now consider the arguments of the three appellants pursuing claims for invasion of privacy by publication of private facts.

All three appellants in question were named as victims of violence perpetrated on them by officers who were their spouses or dates. Appellant Leichty and appellant Lewis were both named in an article on ex-officer Donald Lewis that was published on June 26, 1990 at page 6. Ex-officer Lewis was fired from the

force some eleven years before the story was published, and was deceased for a year before the story was published.

The story revealed that appellant Leichty was his first wife, and appellant Lewis was his second wife.

The story also revealed that appellant Leichty divorced ex-officer Lewis after a series of incidents of domestic violence. Appellant Leichty did file charges against her then husband, but always dropped the charges before he was prosecuted. The reporters stated: "Internal Affairs does not investigate any of her cases, as investigators either were not notified, ruled the allegations too sketchy, or decided the courts could handle any penalties." "Other key domestic violence cases", The Blade, June 27, 1990, at 4. The Blade reporters learned about the incidents by reviewing the internal affairs file on ex-officer Lewis. Appellant Leichty was divorced from ex-officer Lewis for fifteen years before the article was published.

Appellant Lewis was widowed when ex-officer Lewis died a year before the article in question was published in The Blade. The article contained the information that ex-officer Lewis allegedly "punched out" a bar patron who said he was trying to stop ex-officer Lewis from beating appellant Lewis. Twenty days after the fight, ex-officer Lewis was fired from the police force. Appellant Lewis acknowledges that the bar patron did claim her husband was beaten her and he got struck when he tried to intervene, but she says the bar patron

was wrong.

Appellant Kristoff, who is a police officer, was identified by name on two separate occasions and by photograph on one occasion, as the victim of violence committed by a male police officer she dated for a time. The first time she was identified by name and photograph was on June 27, 1990. Her photograph, the photograph of the male officer who committed the violence, and the photograph of another female police officer who was also a victim of the male officer's violence, appeared in a shaded box Hear the top of page four. The text accompanying the photos explained that the male officer was accused of "beating or menacing no fewer than six girlfriends, two of them fellow officers ***" The Blade, June 27, 1990, and named the two female officers. The information was included in a series of articles about domestic violence committed by officers.

The reporters for The Blade named appellant Kristoff for the second time in an article published on June 29, 1990. In a series of articles about the misuse of firearms by officers, particularly when the officers were off-duty, the reporters included the details of what happened to appellant Kristoff. The male police officer she dated for a time came to her home in the early morning hours. He was drunk and angry because she had begun dating other officers. He overheard her talking with someone on the telephone on an earlier occasion. He asked to whom she was talking at the time, but she would not tell him. When he arrived at her

apartment, he again demanded to know to whom she was speaking on the phone at the earlier time. When she still refused to tell him, he, pinned her down and pulled the trigger on his gun, which he had placed between her legs. He pulled the trigger twice before she told him with whom she talked on the phone. He then showed her that the chamber in his gun was empty.

Internal affairs investigated the incident and initially chose not to pursue it, because of the male officer's denials that it ever happened. However, the complaint was reinvestigated when a second female police officer filed a domestic violence complaint against the same male police officer two years later. Internal affairs found at least six women who alleged the same male officer had been abusive toward them in dating relationships. The male officer was suspended for five days for conduct unbecoming an officer.

Appellants Leichty, Lewis and Kristoff all argue that the internal affairs files were not public records when the information concerning their various incidents as victims was compiled. They acknowledge that the legislature subsequently amended the public records laws in Ohio to render internal affairs files public. They argue, however, that they had a privacy interest in the information that could not be divested by subsequent amendments to the public record laws in Ohio, and records made prior to the date the law was amended remain private. Finally, they argue that the information was too old to be considered of legitimate concern to the public.

While appellants Leichty, Lewis and Kristoff are correct that the internal affairs files were not considered public records when the informant on about their victimization was collected, they are not correct when they argue that the subsequent changes in Ohio law did not render the files public. The Supreme Court of Ohio ruled in 1980: "Law enforcement records compiled before the amendment of R.C. 149.43 are available to the public provided they are public records as defined by R.C. 149.43 and are not exempted from disclosure by its provisions." *State ex rel. Beacon Journal Publishing Co. v. University of Akron* (1980), 64 Ohio St.2d 392, syllabus. In the text of its opinion, the Supreme-Court of Ohio said:

> "Concededly, the creation of the records took place prior to the legislative amendment at issue, but this is not the conduct regulated by the statute. R.C. 149.43 deals with the availability of public records, not with the recordatiori function of governmental units. The date the records were made is not relevant under the statute. Since the statute merely deals with record disclosure, not record keeping, only a prospective duty is imposed upon those maintaining public records." *Id.* at 396.

Accordingly, the trial court did not err when it ruled that the appellants in question failed to prove an essential element of invasion of privacy by publication of private facts: the facts publicized were not private, they were already part of the public record. See *Killilea*

v. Sears, Roebuck & Co., 27 Ohio App.3d at 166-167.

Furthermore, we agree with the trial court's conclusion that this information was of legitimate public interest, even if it was several years old when it was reported. As the trial court noted, the information was not previously available because police internal affairs files were not considered public records until the Supreme Court of Ohio ruled they were shortly before the reporters started their investigation in this case. Accordingly, while the information was about long past incidents, it was of legitimate public interest because the information had never before been released to the public. In addition, the discussion of the incidents that happened to these victims was part of a larger view of the internal workings of the police department and how it handled police officers who were alleged perpetrators of violence on their spouses and dating partners.

Finally, we find it unfortunate that The Blade chose to report these appellants, names, but agree with the trial court that the revelation of their identities is not legally actionable as an invasion of the right to privacy by the publication of private facts. As the trial court noted, precedent from the United States Supreme Court has established that the subject matter of the article as a whole, rather than the publication of a specific individual's identity, must be considered to decide if the information published is newsworthy. *Florida Star v. B.J.F.* (1989), 491 U.S. 524, 536-537. In this case, the manner in which the police force handled complaints about domestic violence perpetrated by its own officers

was certainly newsworthy. In addition, as the trial court noted, the United States Supreme Court has made it clear that once the government makes public the names of victims of crimes:

> "'reliance must rest upon the judgment of those who decide what to publish or broadcast' *Cox Broadcasting*, 420 US. at 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence." *Florida Star v. B.J.F.*,491 U.S. at 538.

The Blade lawfully obtained the names of these three appellants and is not legally liable for making the questionable decision to reveal their identities to the public even though they committed no personal wrongdoing and were merely victims of offenses committed by police officers. Appellants, fourth assignment of error is not well-taken.

The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist. Loc.

App. R. 4, amended 1/1/98.

Peter M. Handwork, P.J. (Signature)

George M. Glasser, J. (Signature)

Melvin L. Resnick, J. (Signature)

The Supreme Court of Ohio

1999 Term

Michael Dennis Early et al.,: Case No: 98-2490

Appellants,:
Entry e:

The Toledo Blade,:
Appellee.

Upon consideration of te jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by George C. Rogers.

(Lucas County Court of Appeals; No. L971286)

Thomas J. Moyer
Chief Justice

FILED: MARCH 3, 1999
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SUPREME COURT OF OHIO

Supreme Court, U.S.
FILED
SEP 22 1999
OFFICE OF THE CLERK

(2)

No. 99-331

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Michael Dennis Early, et al.,

Petitioners,

v.

The Toledo Blade Company, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court of Appeals
Of Lucas County, Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT 3

I. THE FIRST QUESTION PRESENTED IS NOT RAISED BY THE RECORD BELOW AND DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW ON A PETITION FOR CERTIORARI 3

II. THIS COURT LACKS JURISDICTION TO DECIDE THE SECOND QUESTION PRESENTED BECAUSE SUMMARY JUDGMENT ON PETITIONERS' PRIVACY CLAIMS WAS GRANTED AND AFFIRMED ON MULTIPLE INDEPENDENT AND ADEQUATE STATE LAW GROUNDS 6

CONCLUSION 8

EXHIBIT A

TABLE OF AUTHORITIES

Page

Cases

Coleman v. Thompson, 501 U.S. 722 (1991) 2, 7

The Florida Star v. B.J.F., 491 U.S. 524 (1989)..... 7

United States v. Johnson, 268 U.S. 220 (1925) 6

Miscellaneous

Sup. Ct. R. 10 6

Sup. Ct. R. 14 (1)(g)(i) 4

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On Petition For A Writ Of Certiorari
To The Court of Appeals
Of Lucas County, Ohio[1]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Toledo Blade Company (improperly identified by petitioners as "The Toledo Blade") and Blade Communications, Inc. (collectively "The Blade"), respectfully submit this Brief in Opposition to the Petition for Writ of

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[1] Petitioners have erroneously petitioned this Court for a writ of certiorari to the Supreme Court of Ohio, a court which declined to exercise its jurisdiction to review this case. Petitioners seek review of the judgment of the Court of Appeals of Lucas County, Ohio.

Certiorari of Petitioners Michael Dennis Early, et al. [2]

JURISDICTION

The Court lacks Jurisdiction to decide the second question purportedly presented because the court of appeals' affirmance of the summary judgment for defendants on plaintiffs' privacy claims rested on multiple independent and adequate state grounds. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991).

STATEMENT OF THE CASE

Petitioners are ten unsuccessful plaintiffs who brought nearly forty claims for defamation and invasion of privacy against The Toledo Blade Company, a newspaper publisher. Petitioners seek review of a unanimous court of appeals decision affirming a detailed trial court order granting summary judgment against plaintiffs on each and every one of their claims.

For nearly nine years petitioners pressed their case in the Ohio courts, advancing a profusion of meritless claims based on the publication of a series of articles based largely on the public records of the Internal Affairs Division of the Toledo Police Department. Three of the petitioners advanced

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[2] In the caption to the Petition, "The Toledo Blade" is improperly designated as the sole respondent in this case. Respondents have corrected the caption to reflect the proper name of respondent "The Toledo Blade Company" and have added the signal "et al." in reference to the additional respondent Blade Communications, Inc. Pursuant to Supreme Court Rule 29, respondents' corporate disclosure statement is attached hereto as Exhibit A.

claims for invasion of privacy and the remaining seven petitioners advanced libel claims.

Following exhaustive discovery by plaintiffs, The Blade moved for summary judgment on all of petitioners' claims on multiple, independent state and federal grounds. The trial court devoted years to a painstaking review of the massive record and an analysis of all of petitioners' multitude of claims. The result was an extraordinary 163-page opinion which meticulously addressed each of petitioners' claims and methodically identified the numerous state and federal grounds requiring summary judgment against petitioners on each of them.

The Court of Appeals of Lucas County, Ohio afforded petitioners a second plenary review of their claims. Like the trial court, the court of appeals engaged in a thorough analysis of petitioners' claims, issuing a detailed 58-page opinion. Also like the trial court, the court of appeals unanimously concluded that none of petitioners' claims could survive summary judgment. On March 3, 1999, the Ohio Supreme Court summarily denied petitioners' request for discretionary review.

ARGUMENT

I. THE FIRST QUESTION PRESENTED IS NOT RAISED BY THE RECORD BELOW AND DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW ON A PETITION FOR CERTIORARI.

Petitioners' first question presented asks whether advertisements describing a series of newspaper articles as accurate and fair may be considered in determining whether portions of the series were published with actual malice. This question presupposes a ruling that was never made below, either by the trial court or the court of appeals.

In the trial court, the petitioners introduced evidence of The Blade's advertisements and argued it supported an inference of actual malice warranting a trial on their libel claims. The Blade neither moved to strike any evidence relating to its advertisements nor argued that such evidence could not be considered by the courts below. Likewise, the trial court did not strike or otherwise refuse to consider evidence relating to the advertisements, and neither the trial court nor the court of appeals ruled -- or even suggested -- that such evidence could not or would not be considered in determining whether the petitioners had met their burden of raising a triable issue of actual malice. Indeed, each court manifestly considered the entire record before the trial court on summary judgment.

Quite simply, while neither court below found any merit in any of petitioners' claims, neither court ruled in any way that The Blade's advertisements could be considered in determining whether it had acted with actual malice. Consequently, it is not surprising that petitioners have disregarded the requirement of Supreme Court Rule 14 that a petition for certiorari must specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts...." Sup. Ct. R. 14 (1)(g)(i).

The Reasons for Granting the Writ of Certiorari urged by petitioners, which depart markedly from the question presented, confirm that petitioners' true complaint is not that either of the courts below refused to consider the evidence presented by petitioners, but simply that petitioners are dissatisfied with the well-supported conclusions reached by both of the courts below in finding that the evidence proffered by petitioners was insufficient, as a matter of law, to survive summary judgment on any of their multitudinous claims. *See* Pet. at 8-12. Petitioners' argument that this Court should exercise certiorari jurisdiction consists of little more than a

rehash of factual arguments made below in connection with one of the claims of petitioner George Taylor. Those factual arguments were examined thoroughly by each of the courts below. *Compare* Pet. at 9-12 *with* App. at A77-A85, A207-A211.

Based on detailed analyses of the evidence, both courts below concluded that petitioner Taylor failed to meet his burden of coming forward with evidence sufficient to raise any triable issue of actual malice.[3] In fact, as the trial court noted, petitioner Taylor had gone so far as to concede at deposition that he had no evidence that The Blade reporters either knew the report concerning him was false or that they thought it was false.[4] *See* App. at A81. Thus, the single claim offered by petitioners as illustrative of the alleged error below simply reinforces the conclusion reached by each of the courts below -- namely, that petitioners' claims were singularly lacking in merit.

Finally, even if petitioners could show that their first question were presented by the record below (which they cannot), and even if they could identify some reason to suspect

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[3] *See* App. at A85 (trial court) ("Even looking at the totality of the circumstances, there is insufficient evidence to demonstrate that the aforementioned publication was made with the requisite minimal reckless disregard for the truth."), A210-A211 (court of appeals) ("[T]here is no evidence that the reporter published his statements with knowledge they were false or with reckless disregard regarding whether they were false.").

[4] The record did not even establish that the report in question was inaccurate. There is no support for petitioners' assertion that the record shows that the challenged reports were false or that The Blade's reporters believed them to be false. *See* Pet. at 4. Similar mischaracterizations of the record, to which The Blade respectfully objects, appear throughout the Petition for Writ of Certiorari.

that their claims were wrongly decided below (which they also cannot), they still have not demonstrated why an exercise of this Court's discretionary jurisdiction would be warranted. Petitioners have not attempted to show that the decision below conflicts with any decision by any state court or federal court, nor have they offered any explanation as to how the questions presented bear any of the other earmarks of an issue worthy of consideration on a petition for certiorari. *See* Sup. Ct. R. 10. Rather, petitioners at best present a personal complaint about a ruling in which the courts below applied well-settled law to idiosyncratic facts. The Court has long held that such cases are not appropriate for certiorari review. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioners' request for a writ of certiorari on the first question presented should therefore be denied.

II. THIS COURT LACKS JURISDICTION TO DECIDE THE SECOND QUESTION PRESENTED BECAUSE SUMMARY JUDGMENT ON PETITIONERS' PRIVACY CLAIMS WAS GRANTED AND AFFIRMED ON MULTIPLE INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

The second question presented purports to challenge the court of appeals' affirmance of summary judgment on petitioners' claims for invasion of privacy by publication of private facts. This Court lacks jurisdiction to review that aspect of the decision below because those claims were disposed of on multiple independent and adequate state law grounds. Specifically, the court of appeals affirmed summary judgment based primarily on the privacy petitioners' failure to satisfy two required elements of their state law claims.

First, because the published information concerning the privacy petitioners was drawn entirely from Ohio public records, the court of appeals held that that the privacy petitioners could not show publication of private facts

concerning them.[5] Second, the court of appeals ruled that the privacy petitioners failed to demonstrate that the information published by The Blade was not of legitimate concern to the public, another required element of their claims under Ohio law.[6] Only after identifying these two independent state law grounds for its ruling did the court of appeals go on to hold that summary judgment also was independently required under the First Amendment principles set forth in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). *Id.* at A244-A245.

This Court has repeatedly held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman,* 501 U.S. at 729. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Because the court of appeals explicitly affirmed summary judgment on all of the privacy petitioners' claims on multiple, independent and adequate state law grounds this Court lacks jurisdiction to review the second question presented.

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[5] *See* App. at A243 ("[T]he trial court did not err when it ruled that the appellants in question failed to prove an essential element of invasion of privacy by publication of private facts: the facts publicized were not private, they were already part of the public record.").

[6] *See* App. at A244 ("[W]e agree with the trial court's conclusion that this information was of legitimate public interest....").

CONCLUSION

Because the first question urged by petitioners is not presented by the record below and, in any event, does not merit an exercise of the Court's certiorari jurisdiction, the Court should deny petitioners' request for a writ of certiorari as to that question. Because the second question presented seeks review of claims that were disposed of below on multiple independent and adequate state grounds, the Court lacks jurisdiction to review that question.

Respectfully submitted,

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EXHIBIT A

Respondent, The Toledo Blade Company, is an operating division of respondent Blade Communications, Inc., a privately-held Ohio corporation. Blade Communications, Inc., has no parent corporation and no publicly-held company owns 10% or more of the corporation's stock.